117-657

Office Supreme Court U. S.
FILED.
SEP 12 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 464.

COUNTY OF DAVIESS, - Plaintiff in Error,

vs.

J. M. DICKINSON, - - Defendant in Error.

Brief and Argument

—BY—

GEO. W. JOLLY, ATTORNEY FOR PLAINTIFF IN ERROR.

MESSENGER AND EXAMINER PRINT, OWENSBORO, KY.

Supreme Court of the United States.

OCTOBER TERM, 1885. No...................

THE COUNTY OF DAVIESS, Plaintiff in Error,

versus

J. M. DICKINSON, - - Defendant in Error.

Brief and Argument for Plaintiff in Error.

STATEMENT.

February 27th, 1867, the Legislature of Kentucky passed "An Act to Charter the Owensboro and Russellville Railroad." The first section, in part, is as follows:

"§ 1. That Dr. William A. Hickman, T. B. Hardin, "H. W. Scott, Dr. W. D. Stirman, George W. Swoope "and S. M. Wing, of Daviess county; * * * * *be* "*and they are hereby appointed Commissioners*, under the direction of whom, or any three of them, in each of "said counties, * * * "

Part of the second section is as follows:

"§ 2. That the capital stock of said Owensboro and "Russellville Railroad Company shall be one million dollars, *in shares of twenty-five dollars each*, * * *"

And section nineteen is as follows:

"§ 19. That the county courts of Daviess, Ohio, Mc-"Lean, Muhlenberg, and Logan counties, shall have pow-

"er and are hereby authorized to subscribe to the capital "stock of said company in such number of shares as may "be determined by said county courts respectively, and "to levy upon the tax-payers of such counties respectively "such taxes as may be necessary to pay the stock so by "them respectively subscribed; and said courts may, if "they shall deem it prudent, issue the bonds of said counties respectively FOR THE AMOUNT OF STOCK SUBSCRIBED, "OR ANY PART THEREOF; SAID BONDS TO BE IN SUCH SUMS "AND PAYABLE AT SUCH TIMES, AS SAID COUNTY COURTS "MAY DETERMINE UPON. But before such stock shall "be subscribed by said county courts, the said county courts shall submit to the voters of said counties the "proposition to subscribe stock and the amount thereof; "(TO BE SUGGESTED AND FIXED BY THE COMMISSIONERS "NAMED HEREIN IN EACH OF SAID COUNTIES,) at an election to be held on the third Monday in April, 1867, in "each of the counties aforesaid, due notice of which shall "be given by the sheriffs in each of said counties, by "written advertisements posted in each of the voting precincts thereof for at least thirty days before said day of "election; and said stock shall not be subscribed unless "a majority of all the votes cast at said election be in favor "of such proposition; and said county courts shall have "power to appoint suitable and necessary officers to conduct such election, and to provide for the collection of "the tax aforesaid, *if a majority of the votes cast at such* "*election is in favor of the proposition aforesaid.*"

At the March term, 1867, of the Daviess County Court, the commissioners named in the Act, namely, Stirman, Hickman, Scott, Hardin and Wing, appeared and in writing "suggested and fixed" the amount of stock, to be submitted to the voters of Daviess county for subscription, at *ten thousand shares*. The writing was entered upon the order book, and the court then made an order submitting the proposition to the voters at an election to be held on the third Monday in April, 1867. (See the Record on page 18, and also 50.)

A majority of the votes cast at the election were in favor of the subscription.

At the April term, 1868, the county Court made the subscription pursuant to the vote. At the July term, 1868, the county court made an order as follows:

"It is ordered that Geo.. W. Triplett, presiding judge of
"Daviess county, W. B. Tyler and E. C. Berry be and
"are hereby appointed a committee on behalf of the county
"court of Daviess county, to have bonds executed and
"prepared of a sufficient amount to satisfy and pay off the
"subscription on the part of the county of Daviess to the
"Owensboro and Russellville Railroad Company, and that
"said bonds be executed and made payable as follows,
"*Fifty thousand dollars five* years from date; *fifty thousand*
"*dollars ten* years from date; *seventy-five thousand dollars,*
"*fifteen* years from date; *seventy-five thousand dollars,*
"*twenty* years from date—the county reserving the right to
"pay at any time after five years; the interest on the
"same at the rate of six per cent. per annum, to be due and
"payable semi-annually at such place or places as said
"committee may determine upon, and that said bonds shall
"be of such denomination as said committee shall deem
"best, with interest coupons attached; and said bonds shall
"be signed by the presiding judge of Daviess county and the
"clerk of the county court of Daviess county, and have
"the seal of the county impressed on each; and said com-
"mittee, or a majority of same, may sell and dispose of
"said bonds either to the Owensboro and Russellville Rail-
"road Company or to individuals or other corporations,
"on such terms as said committee may deem best and
"most advisable to the interests of the county of Daviess
"in paying the subscriptions of said county to the Owens-
"boro and Russellville Railroad Company, and they are
"hereby authorized to raise funds from said bonds either
"by sale to individuals or corporations, or by contract with

"said railroad company, so as to pay off and meet all calls "made by the Owensboro and Russellville Railroad "Company by reason of the subscription of stock on behalf "of the county of Daviess to said railroad company.

"It is further ordered that whenever any bond shall be "sold or otherwise disposed of by said committee for the "purpose aforesaid that a list of said bonds shall be made, "giving the amount, number and denomination of same, "with the amount of coupons attached to each at the time "of their disposal, and said list so furnished shall be entered upon the records of the county court of Daviess "by the clerk of same.

"The presiding judge of Daviess county court is hereby "empowered and directed to take all necessary and proper "steps to secure the payment of all interest that may ac- "accrue by reason of the sale of any of the bonds herein "mentioned, and to do so it is hereby made his duty to "appoint two or more collectors of the railroad tax, taking good and sufficient bonds from each to diligently "perform their duties as such and pay over all monies "that may come to their hands as collectors aforesaid "whenever so ordered and directed; and a special tax to "be called the railroad tax, of twenty-five cents on each "and every one hundred dollars of taxable property in "the county of Daviess is now levied, and is to be due "and payable on or before the first day of December of "each year until this court shall otherwise order."

A record was kept pursuant to this order in which all bonds were entered. (See copies therefrom, Record, p. 72-77.)

The county court was composed of the county judge and a majority of the justices of the peace in Daviess county. (See Art., XVII, ch. 28, p 306, Gen. Stats. of Kentucky.) By the statutes, the county courts in Kentucky are made courts of record. (Gen. Stats. Art XVII. § 5, p 307.) And the records of the county court are conclusive evidence of what is done in court. *Handley vs. Russell*, (Hardin 152); *Talbutt vs. David*, (2 Mar. 606).

Mercer County Court vs. Kentucky River Nav. Co. (8 Bush, 300).

The bonds of Daviess county were issued, dated January 1, 1869, payable to bearer as follows:

511 bonds of $50 each, payable five years after date, numbered from 1 to 511, Letter A, amounting to $25,550.

257 bonds of $200 each, payable five years after date, numbered from 1 to 257, Letter B, amounting to $25,700.

Total amount of 5 year bonds, $51,250.

212 bonds of $100 each, payable ten years after date, numbered from 1 to 212, Letter C, amounting to $21,200.

88 bonds of $500 each, payable ten years after date, numbered from 1 to 88, Letter F, amounting to $44,000.

Total amount of 10 year bonds, $65,200.

153 bonds of $500 each, payable 15 years after date, numbered from 1 to 153, Letter D, amounting to $76,500.

And 255 bonds of $500 each, payable 20 years after date, numbered from 1 to 255, Letter E, amounting to $127,500, making a total of $320,450.

These bonds were delivered as shown by the table on page 31 of the record, beginning June 5th, 1869 and ending March 22, 1870. On the last mentioned date 185 bonds of $500 each, Letter E, running twenty years and amounting to $92,500 were delivered. It will be observed the first numbers of each series were first delivered. I contend, that under the language of section 19 of the Act chartering the railroad above quoted, namely, "and said "county courts may, if they deem it prudent, issue the "bonds of the counties respectively *for the amount of "stock subscribed, or any part thereof; said bonds to be in "such sums and payable at such times, as said county courts "may determine upon,*" the Daviess county court had the power to make the debt payable in instalments at the different periods of five, ten, fifteen and twenty years, as it did, by its orders entered of record.

Assuming that some are valid, and some void, the question will be whether, the whole excessive issue of $70,450 shall be taken off the batch of twenty year bonds amounting to $92,500, delivered on March 22, 1870. (Nos. 115 to 255, making $70.500). Or whether, the plan adopted by the State court of declaring certain bonds constituting the excessive issue of each series, and aggregating $70,450, constitute the void bonds. (See the record, page 107.)

On May 12, 1875, A. G. Howard and others, taxpayers of Daviess county, instituted a suit in equity in the Daviess circuit court, against the Daviess county court, the Owensboro and Russellville Railroad Company, C. D. Jackson, James Weir, J. H. Smith, the Deposit Bank of Owensboro, the Planters Bank and all the other owners of the bonds of Daviess county.

All the defendants except the unknown bondholders, were brought before the court by summons duly served on them and these defendants, (except the Deposit Bank and James Weir, who denied ownership of any of the bonds,) filed a joint answer.

The object of this suit was to test the validity of the bonds, and especially of the excessive issue of $70,450; and to perpetually enjoin the collection of taxes for the payment of such bonds as were void.

A judgment was rendered 24th January, 1876, (Record, p 96), holding that the excessive issue of $67,350 were void. The answer alleged that the total amount of bonds issued was $317,350 instead of $320,450 as alleged in the petition, and perpetually enjoined the county court from levying a tax to pay the principal or interest of this excess, but permitted that court to levy taxes for the payment of the first bonds issued and delivered, to the extent of $250,000, and no more. (Record, p 97.)

An appeal was prosecuted to the Court of Appeals from this judgment by the Daviess county court; and on March 30, 1877, the judgment of the court below was *affirmed*. The case is reported in 13 Bush. pp 104-111.

The opinion in full as it there appears is as follows, to-wit:

Judge Pryor delivered the opinion of the court:

"This is an appeal in the name of the Daviess County Court against A. G. Howard and others, tax-payers of the county of Daviess. The Owensboro & Russellville Railroad Company was chartered by an act of the legislature passed in the year 1867. By the 19th section of the act of incorporation it was provided "that the county courts of Daviess, McLean, Ohio, Muhlenberg, and Logan counties shall have power, and are hereby authorized, to subscribe to the capital stock of the company in such number of shares as may be determined by said county courts, respectively, and to levy upon the tax-payers of such counties, respectively, such taxes as may be necessary to pay the stock subscribed; *and the said county courts may, if they shall deem it prudent, issue the bonds of said counties, respectively, for the amonnt of stock subscribed, or any part thereof*; said bonds to be in such sums, and payable at such times, as said county courts may determine upon. But before such stock shall be subscribed by the county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock, and the amount thereof (to be suggested and fixed by the commissioners named herein), at an election to be held after due notice," etc. The commissioners for Daviess county, in accordance with this provision of the charter, suggested to the county court a submission to the voters of the question, "Will the voters instruct the county court to subscribe ten thousand shares to the capital stock of the company?" The vote was regularly and properly taken, and, a majority of the voters favoring the subscription, the sum of $250,000 was subscribed and taken by the county as stock in the corporation, the shares being $25 each.

At the July term of the Daviess County Court, held in the year 1868, it was ordered that Geo. W. Triplett, the county judge, W. B. Tyler, and E. C. Berry be and are hereby appointed a committee, on behalf of the county court of Daviess County, "to have bonds executed and prepared of a sufficient amount to satisfy and pay off the subscription, on the part of the county of Daviess, to the Owensboro & Russellville Railroad Company; that said bonds be executed and made payable as follows, viz: $50,000 five years from date, $50,000 ten years from date; $75,000 fifteen years from date; $75,000 twenty years from date; the bonds bearing interest at six per cent. per annum, payable semi-annually; for the payment of which coupons were attached," etc. The committee, or a majority, were authorized to "sell or dispose of the bonds either to the Owensboro & Russellville Railroad Company, or to individuals, or to other corporations, on such terms as said committee may deem best and most advisable to the interests of the county of Daviess, in paying the subscription," etc.

At a subsequent term of the court, held in the same month—July, 1868—it was recited "that as the court had ordered the committee to have bonds prepared and executed, in a sufficient amount to satisfy and pay off the subscription, and to sell and dispose of said bonds, either to individuals or corporations, *it is now ordered that said order be so amended as to authorize said committee to appoint agents to sell said bonds.*"

Under these orders of the county court the bonds of the county were executed, not only for the $250,000 and its interest, but for the additional sum of $67,350, making the whole amount of interest-bearing bonds, with coupons attached, $317,350. These bonds, as is alleged in the petition, were sold to the railroad company, in discharge of the county subscription, and many of them are now in the hands of parties unknown to the plaintiffs in the action. A tax has been levied on the tax-payers of the county to pay the bonds as they matured, and the accruing interest on the whole amount. The plaintiffs, the tax-payers of the county, instituted the present action, in which they seek to enjoin the county court from collecting either the principal or interest upon the bonds issued in excess of the $250,000, insisting that the county court, as the agent of the tax-payer, exceeded its authority in making sale of any of the bonds, and that the bonds, other than those directed to be issued by the order of the county court, made in July, 1868, are void. The county court, or its committee, acted upon the idea that it was invested with the power to execute and sell at a discount as many bonds as were necessary to raise the money to pay the subscription of $250,000. This is the sole question presented by the record.

"It is alleged in the petition that the railroad company, the Planters Bank, and others are the holders of some of these bonds, and as they were made defendants to the action, and the court refused to pass upon the question as to the liability of the county to them, the appellees, the tax-payers, have prayed a cross-appeal. This cross-appeal cannot be considered, as the parties against whom it is prayed, or who are to be affected by it, are not before the court. The court below has enjoined the county court from proceeding to collect the interest on the bonds in excess of the $250,000. The defendants, if they hold any such bonds, are not complaining, as they have failed to prosecute any appeal. The appeal is here by the Daviess County Court against the tax-payers, that tribunal insisting upon its right to levy the tax to pay the interest on all the bonds issued and sold to satisfy the county subscription. The controversy is between the agent and principal.

"The county court, by virtue of the 19th section of the act incorporating the railroad company, was invested with the power to pay the county subscription by levying a tax upon the property of the citizen, or by issuing county bonds in whole or in part in discharge of the indebtedness. The power to issue bonds was limited in amount to the sum subscribed by the county to the capital stock, and the county court, looking to the extent of the power with which it was clothed by the act in question, designated the number and amount of bonds to be issued by an order of that court made in July, 1868. This order directed the execution of bonds for $50,000 payable in five years, a like amount payable in ten years, $75,000 payable in fifteen years, and a like sum payable in twenty years, with interest coupons attached, payable semi-annually. This covered the entire subscription, and when issued it was proper for the county court to deliver them over to the railroad company in payment of the subscription made by the county. These were all interest-bearing bonds, and when executed by the county for the amount of stock subscribed, the county court acted within the scope of the authority conferred by the act, and exhausted all the power that tribunal had to discharge the indebtedness in that manner.

"The act especially authorized the county court *to issue bonds for the amount of stock subscribed*, but we find no power conferred by the charter upon the county court to issue bonds for $317,350. It was a cash subscription, and the interest-bearing bonds are to be regarded as equivalent to a cash payment, and if the railroad company declined to accept them in discharge of the subscription, it was the duty of the county court to raise the money by taxation. That tribunal had no right, either by reason of its jurisdiction over the subject-matter, or by the letter or spirit of section 19 of the railroad charter, to issue bonds for an unlimited amount, and then place them upon the market at a discount, in order to satisfy the debt to the railroad company. The power to issue bonds does not imply the power to sell. No general power is conferred upon county courts to issue such bonds or to subscribe stock in behalf of the county, in which the tribunal exists, to railroad companies or other corporations, and when this extraordinary power is conferred by legislative enactment, by which a bare majority of the votes cast may impose upon a large minority of the citizens or tax-payers a taxation by which they are to be burdened for years, courts should not be inclined to disregard, although it may be done by a liberal construction, the conditions and restrictions placed by the legislature upon such an exercise of power.

"The powers conferred by such legislation should be strictly pursued, and the fact that the county has incurred the liability cannot be held to justify any action the county court may see proper to take, in order to secure its payment. In this case the voter agreed to be taxed in the sum of $250,000, the debt to be discharged by a direct tax or by the issuing of bonds for that amount, bearing interest. He has agreed to pay that sum, and to say that because he voted to pay that amount, he is liable to pay the additional sum of $67,350 is not warranted by the letter or spirit of the law conferring the power on the county court to tax him, or consonant with natural justice. If the legislature had been asked to vest in the county court of Daviess the power to raise by taxation the sum of $317.350, the whole sum bearing interest, to pay this debt of $250,000, would such a proposition have received serious consideration? Or if such authority had been expressly given, is it to be presumed that the tax-payer would have been so regardless of his own interest as to cast his vote in favor of the measure?

"It was never contemplated that these bonds should be sold at a discount, either by the county court or the railroad company, so as to make the county responsible for the deficit. The power to sell the bonds to raise the money to pay for the stock was not given by the act. The bonds bearing interest were worth as much as the stock subscribed, and were so regarded, no doubt, by the legislature when enacting the law. The county court, in fact, never authorized the issuing of bonds for a greater amount than $250,000, and if that tribunal had the right to exceed the power conferred upon it, still it has not attempted to exercise this right except by a levy of the tax upon the citizens to pay the interest. It is maintained by the county court that because it has once levied the tax, or continued to do so, since the bonds were issued to pay the interest, that this amounts to a ratification of the action of the county court by the tax-payers of the county.

"That the county court obtained all the power that could be properly exercised with reference to this question of taxation from the 19th section of the act incorporating the railroad company is too plain for controversy. The county court, in issuing the bonds in excess of the $250,000, or permitting it to be done by the committee appointed by the court, transcended the authority given by the legislature, and no subsequent act of the county court or of the tax-payers can make valid the exercise of a power that had no legal sanction.

"The corporation knew the extent of the power given the county court by the act incorporating the company. It received the bonds, and is not complaining of the action of the court below. The action of the county court in collecting the tax upon the overissue of bonds, or the interest, was clearly illegal. They were nullities in the hands of either the county court or the corporation, and the payment of the unwilling tax-payer cannot justify this unwarranted exercise of power.

"The voters of the county had no right to assume the burden except in the manner provided by the act. They could not ratify an act that neither the county court or themselves had the power to perform. If the principal could not exercise the right it is difficult to perceive how his sanctioning its exercise by an agent could make it legal. In making the overissue the county court or its committee acted beyond the scope of its agency, and outside of the power given by the legislature. The only way in which the people could ratify it would be by a vote under a legislative enactment.

"It is argued by counsel for the appellant, the county court, that there is no reason to discriminate between the holders of these bonds on account of the date of purchase, and that there is no means of determining which of them are valid and which not. The question cannot well arise between the county court and the tax-payer, and as there has been an excessive issue, the county court cannot complain of the injuction. It does not appear who has possession of the bonds. It is alleged that they were delivered or sold to the corporation, the railroad company. It was made a party defendant, and does not ask to have any equitable distribution of the fund, or to disclose even to whom it has transferred these bonds. The judgment below, enjoining the county court from proceeding to collect the overissue of bonds, or the interest, by levying a tax upon the property of the appellant, is affirmed, and the cross-appeal of the appellees dismissed without prejudice.

"As to the appeal of the tax-payers from the refusal of the court below to modify the judgment, this must also be dismissed without prejudice. The court had no power to correct its judgment at a subsequent term, unless for a clerical misprision, and, as we understand the character of the judgment rendered, it gives to the appellees all they ask; that is, it enjoins the collection of the bonds and interest exceeding the $250,000. (Gould vs. Sterling, 23 New York; City of Atchison vs. Butcher, 3 Kansas; Marsh vs. Fulton County, 10 Wallace; Daniel on Negotiable Instruments, vol. 2, pp. 463, 464.)"

The court in construing the Act hold (1) that the county court had no power to issue any bonds *in excess of the amount of stock subscribed*; (2) that the county court had no power to *sell* the bonds, and (3) that there had not been and could not be, any ratification of the overissue, in the absence of a vote by the people under an Act of the Legislature authorizing it.

After the return of the case to the Daviess circuit court, a judgment was rendered in which was adjudged that certain of the bonds were valid and certain others void. Those adjudged to be valid are as follows:

500 bonds, Letter A, $50 each, 5 years, Nos. 1 to 500 inclusive, $25,000.

250 bonds, Letter B, $100 each, 5 years, Nos. 1 to 250 inclusive, $25,000.

Total 5 year bonds, $50,000.

200 bonds, Letter C, $100 each, Nos. 1 to 200 inclusive, 10 years, $20,000.

60 bonds, Letter F, $500 each, Nos. 1 to 60 inclusive, 10 years, $30,000.

Total 10 year bonds, $50,000.

150 bonds, Letter D, $500 each, Nos. 1 to 150 inclusive, 15 years, $75,000.

150 bonds, Letter E, $500 each, Nos. 1 to 150 inclusive, 20 years, $75,000.

Making a total of $250,000.

And the petition in so far as it impeached the validity of these bonds was dismissed. It was also adjudged that the following bonds were issued without power or authority and were void, to-wit:

11 bonds, Nos. 501 to 511 inclusive, $50 each, Letter A, 5 years, $550.

7 bonds, Nos. 251 to 257 inclusive, $100 each, Letter B, 5 years, $700.

Total void 5 year bonds, $1,250.

12 bonds, Nos. 201 to 212 inclusive, $100 each, Letter C, 10 years, $1,200.

28 bonds, Nos. 61 to 88 inclusive, $500 each, Letter F, 10 years, $14,000.

Total void 10 year bonds, $15,200.

3 bonds, Nos. 151 to 153 inclusive, $500 each, Letter D, 15 years, $1,500.

105 bonds, Nos. 151 to 255 inclusive, $500 each, Letter E, 20 years, $52,500.

Making a total of void bonds, $70,450.

It was also adjudged that the injuction heretofore granted applied to those bonds amounting to $70,450. (See Record pp. 106 and 107.)

This constitutes a brief history of the matter up to the time the defendant in error, J. M. Dickinson, instituted his action in United States Circuit Court at Louisville, on the 3rd day of April, 1879.

Dickinson sues (1) on twelve of the ten year bonds, Letter F, numbered 4, 9, 10, 28, 41, 42, 52, 53, 54, 58, 59 and 60 of $500 each, amounting to $6,000; (2) on twenty-one ten year bonds of $500 each, Letter F, numbered 61, 62, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87 and 88, amounting to $10,500; (3) on eighty-four interest coupons of $15 each, cut from the 21 bonds mentioned in paragraph (2) above, 21 of which matured July 1, 1877, 21 others January 1, 1878, 21 others July 1, 1878, and 21 others maturing January 1, 1879, amounting to $1,260. (4) on twelve coupons of $15 each, cut from 15 year bonds of $500 each, Letter D, numbered 151, 152 and 153, three of which coupons matured July 1, 1877, three January 1, 1878, three July 1, 1878, three January 1, 1879, amounting to $180, and (5) on ninety-two coupons of $15 each, cut from 23 of the 20 year bonds, numbered 151, 152, 153, 157, 161, 163, 166, 167, 171, 175, 176, 202, 211, 214, 217, 218, 219, 222, 229, 238, 239, 244, 245. Twenty-three coupons matured July 1, 1877, twenty-three January 1, 1878, twenty-three July 1, 1878, and twenty-three January 1, 1879, amounting to $1,380, making the total sum sued for $19,320.

It will be contended for the county that all the bonds and coupons sued on except those 10 year bonds of $500 each described in paragraph (1) above, amounting to $6,000, numbered 4, 9, 10, 28, 41, 42, 52, 53, 54, 58, 59 and 60, are void, and that the judgment, except as to the $6,000, is erroneous and ought to be reversed.

It is alleged in the original answer, paragraph one, amended answer, paragraph five, that "By the provisions "of an act of the General Assembly of the Common- "wealth of Kentucky, approved February 27, 1867, the "same mentioned in the petition, and the acts amendatory "thereof, the county court of Daviess county was not "authorized or empowered to issue the bonds of said "county *except to the amount of the capital stock* of the "Owensboro & Russellville Railroad Company, *subscribed* "*by said county*; *that the amount of capital stock of said* "*company so subscribed was two hundred and fifty thousand* "*dollars, and no more;* and that any bonds of the said "county issued for the purposes named in said act in ex"cess of $250,000 are illegal and void." (See Record, p. 5, and also p. 15.)

It is also alleged (See Record, p. 17) that, "The judge "of the county court of Daviess county in delivering "from time to time the bonds of each series delivered the "same according to the numbers in each series respec"tively, the smaller numbers being delivered first, and the "larger numbers afterwards.

"But said bonds 'F,' Nos. 64 to 88 inclusive, were de"livered simultaneously, and bonds 'E,' Nos. 71 to 255, "were delivered simultaneously, and defendant says that "said bonds of series F, and said coupons of series E, above "mentioned, as sued upon herein, are not the act and "deed of said county of Daviess, or of said county "court. (Record, p. 17.)

"Also," defendant further says that, "by said order" (that is the order of July term, 1868, directing the issue of bonds, filed with the answer as exhibit A, and copied in full in the record on page 22, and also on pages 53 and 54 in record in Howard vs. County Court,) "of the Davi"ess county court, which as aforesaid, directed the issue "of said bonds, it was ordered, that whenever any bonds "shall be sold or otherwise disposed of by said committee "for the purposes aforesaid that a list of said bonds shall "be made, giving the amount, number and denomination "of the same, with the amount of coupons attached to "the same at the time of their disposal; and said lists so "furnished shall be entered upon the records of the coun"ty court of Daviess, by the clerk of the same," and in pursuance of said order, "such list was made and entered "on the records of said county court from time to time as "said bonds were disposed of, and the same was at all "times open to public inspection." (See the Record, p. 16.)

It is also alleged that at its July term, 1868, the Daviess county court made an order appointing Triplett, Berry and Tyler a committee to issue the bonds of Daviess county in discharge of the subscription made to the capital stock of the Owensboro & Russellville Railroad Company, as follows:

$50,000 payable five years from date.
$50,000 payable ten years from date.
$75,000 payable fifteen years from date.
$75,000 payable twenty years from date.

Amounting to $250,000. (See Record, pp. 5 and also 15.)

There was an answer and two amended answers filed, the whole constituting five paragraphs, and demurrers were sustained to second and third paragraphs.

A jury being sworn, and having heard the evidence returned into the court the following verdict: "We, of the jury, find for the plaintiff the sum of $21,935 94, being the debt in the petition mentioned, with interest thereon to date," and judgment was rendered for the amount with interest and cost.

A bill of exceptions and statement of the evidence is filed and made part of the record. (See Record, pp. 18-32.)

It comprises eighteen paragraphs, of various facts put in evidence before the jury.

A letter of defendant in error, Dickinson, and the second paragraph of his reply by consent of parties were treated as Dickinson's deposition, subject to exceptions for irrelevancy. When they were offered in evidence by Dickinson's counsel, the county objected to the reading of each, because irrelevant to the issue, but the court overruled the objections both to the letter and reply, and allowed them read, to both of which rulings the county excepted.

The county then moved the court to instruct the jury as follows: "That upon the pleadings and evidence the law "is for the defendant upon the issue joined, and that they "find for the defendant upon the same."

To which motion, Dickinson objected, and the court overruled the motion to which the county excepted.

Then, on motion of plaintiff, the court instructed the jury as follows:

"1. The court instructed the jury that if they believe from the evidence that the plaintiff purchased "the bonds and coupons sued for without notice "that more than two hundred and fifty thousand dollars "of bonds had been issued by defendant, and that he so "purchased before maturity, and for value, the law is for "plaintiff.

"2. The court further instructs the jury that the plaintiff "before purchasing said bonds was not bound to examine "the records of the Daviess county court, and cannot be "presumed to have known what said records contain when "he made the purchase."

To which the county objected, but the objection was overruled, and the instruction given, to which the county then excepted.

The jury returned the verdict and the court rendered judgment thereon as stated above.

Assignment of Errors.

It is respectfully submitted that the court below erred as follows:

I. In permitting the letter of Dickinson and the second paragraph of his reply to be read to the jury as evidence, which were, in substance, that Dickinson had bought the bonds and coupons for value, before maturity, giving dates of purchase and amounts paid therefor, and also that Daviess county had paid of the five year bonds, lettered A, Nos. 501 to 511, and Letter B, Nos. 251 to 257; and had paid of the ten year bonds, Letter C, Nos. 2, 4, 6, 47 and 78, prior to January 1st, 1877

II. In overruling the motion made by the county, to instruct the jury that, "upon the pleadings and evidence, "the law was for the county, upon the issue joined, and "that they should find for the defendant county upon the "same."

III. In instruction No. 1 that if they believed Dickinson bought the bonds for value, before maturity and without notice of the excessive issue, the law was for him.

IV. In instruction No. 2 that Dickinson was not bound to examine the records of the Daviess county court, and cannot be presumed to have known what those records contained, when he bought the bonds.

V. In sustaining the demurrer to the second and third paragraphs of the county's answer.

VI. In rendering judgment for the defendant in error, Dickinson, for the $21,935 94 because he was entitled to no judgment for anything except on bonds No. 4, 9, 10, 28, 41, 42, 52, 53, 54, 58, 59 and 60, running ten years from 1st of January, 1860 for $500 each, Letter F, making $6,000, with interest from the 1st day of January, 1879, amounting with interest to Feb. 24, 1881, when the judgment was rendered, to $6,774, the judgment being erroneous to the amount of $15,161 94.

VII. In overruling the county's motion for a new trial.

ARGUMENT.

Upon these facts several questions arise:

First, can authority to issue municipal bonds be limited; what, if any, limitation upon the authority to issue was there in this case, and the nature of it, and were the holders of the paper bound to notice it? And if any bonds were issued without power, to what amount were such bonds issued, and which bonds are void?

Second, is the county *estopped* to show this want of power to issue bonds as against the plaintiff?

Third, Has this "overissue" been ratified?

I.

It is respectfully submitted, that unless the court shall hold that the power to issue these bonds was *incapable* of limitation; that unless the rule be adopted that, with reference to the exercise of the power to issue municipal bonds, there must be conferred, complete, absolute and uncontrollable authority, or none at all; and that the law is, that no authority to issue such paper can be given, which is capable of any effectual limitation upon the exercise of it, the power in the case, conferred by the act of the legislature, approved February 27, 1867, to subscribe stock for the Owensboro & Russellville Railroad Company, and issue the bonds of Daviess county, [redacted] was positively and expressly limited, by section 19 of that act, to "*the amount of stock subscribed.*"

The act did not in terms name the amount of stock that might be subscribed in any of the counties mentioned in it, but certain persons were appointed by the legislature in the first section of the act, as commissioners, for each of the counties mentioned in section 19, those for Daviess county being W. A. Hickman, T. B. Hardin, H. W. Scott, W. D. Stirman, Geo. W. Swoope and S. M. Wing. Section nineteen further provided: "*But before such stock* "*shall be subscribed by said county courts*, the said county "courts shall submit to the voters of said counties the "proposition to subscribe stock and the amount thereof, "*to be suggested and fixed by the commissioners named herein* "*in each of said counties*, at an election to be held on the "third Monday in April, 1867, in each of the counties aforesaid, due notice of which shall be given by the sheriffs in "each of said counties, by written advertisements posted "in each of the voting precincts thereof for at least thirty days before said day of election; *and said stock shall*

"*not be subscribed unless a majority of all the votes cast at*
"*said election be in favor of such proposition* * *"

The commissioners for Daviess county, pursuant to the power vested in them, appeared in the Daviess county court, at its March term, 1867, and in writing, which was entered at large upon the order book of the county, "*suggested and fixed*" the amount of stock to be submitted to the voters of Daviess county for subscription at the election to be held under the act, at *ten thousand shares.*

By the second section of said act, the capital stock of the railroad company was fixed at one million of dollars *in shares of twenty-five dollars each.*

And the county court then made an order submitting the question to the voters of Daviess county at the election to be held on the third Monday in April, 1867, as follows:

"Shall, or shall not, the county court of Daviess "county subscribe *ten thousand shares, being the sum of two* "*hundred and fifty thousand dollars*, to the capital stock of "said Owensboro and Russellville Railroad Company." (See the Record, pp. 18-19.)

A majority of the votes cast were in favor of the proposition to subscribe 10,000 shares of $25 per share, amounting to the sum of $250,000.

Section 5, *Article* 21, *of chapter* 27, *title Courts*, of the *Revised Statutes of Kentucky*, then and now in force, provide that, "The county court is a court of record."

By *subsection* 4 *of section* 3, *Article* 3, *chapter* 17, of those Statutes, it is also provided in prescribing the duties of the clerks of the circuit and county courts, that, "He "(the clerk) must keep his office open, free and accessible "at all times, except the Sabbath day, to every person "having a right or claim to business therein, under the "penalty of five dollars for each failure." And by another provision the clerk's office must be kept at the court houses in the respective counties.

At the April term, 1868, the Daviess county court made an order subscribing $250,000 to the capital stock of the railroad company, pursuant to the vote.

And, at the July term, 1868, an order was made appointing George W. Triplett presiding judge, W. B. Tyler and E. C. Berry a committee to issue the bonds of the county as follows:

$50,000 payable five years from date.
$50,000 payable ten years from date.
$75,000 payable fifteen years from date.
$75,000 payable twenty years from date.
Making $250,000.

The order directed that the bonds should be signed by George W. Triplett, presiding judge, and be countersigned by the clerk of the county court, and have the seal of the county court affixed. Also that the bonds should, as disposed of, be entered upon the records of the court.

County courts in Kentucky relative to the fiscal affairs of the county, have power to levy and superintend the collection of the county levy, erect and keep in repair necessary public buildings and other structures and superintend the same; regulate and control the fiscal affairs and property of the county, make provisions for the maintainance of the poor and provide for the good condition of the public highways of the county and to execute all of its orders consistent with law and within its jurisdiction. (*General Statutes of Kentucky*, 1873, *page* 305.)

In laying the county levy it is limited to $3 on each male citizen over 21 years of age.

Their power of taxation, and appropriation of money is thus limited. They have no general power to subscribe for stock in railroads or other like enterprises, or issue bonds, or loan the county's credit for such purposes, or indeed, for any purpose.

In every case, where it claimed that counties have issued bonds like those in suit, authority must be found, if at all, in some *special* act of the legislature.

Examine the act under which this transaction occurred, and we find (1) that the county had power, under certain limitations, to issue its bonds for "the amount of stock subscribed, or any part thereof;" (2) that no subscription of stock should be made, and no tax levied to pay for stock, unless a majority of the votes cast at the election was in favor of the proposition to subscribe; (3) that neither the court, or the voters, had any power to fix the amount of stock to be subscribed, but that the act conferred upon certain commissioners alone power to "fix" the amount of stock.

That the records of the Daviess county court show (1) that those commissioners appeared in court, and suggested and fixed upon its records—records of "a court of record" which are "open, free and accessible at all times" to the world—the amount of stock to be subscribed at ten thousand shares of $25 per share, amounting to $250,000; (2) that the county court after subscribing the stock made an order directing the bonds to be issued only for the amount of stock subscribed, amounting to $250,000, payable in installments of five, ten, fifteen and twenty years, and (3) that there had been issued bonds for the amount of $250,000, and also an excess of $70,450, making a total sum of $320,450.

No higher form of notice could have been given than that contained in the act of the legislature, and the public records of a court of record, which were open and accessible at all times to the public—records made and kept not by the agents of the people of Daviess county, but by *officers of the law.*

In *Buchanan vs. Litchfield*, 102 U. S., 289 this court said:

"*The purchaser of the bonds was certainly bound to*
"*take notice not only* of the constitutional limitation upon
"municipal indebtedness, *but of such facts as the author-*
"*ized official assessments disclosed concerning the valuation*
"*of taxable property within the city for the year* 1873."

In that case the limitation upon the power to issue bonds was contained in the constitution of the State of Illinois, which provided in substance, that no indebtedness should be contracted that would require a tax beyond a certain named rate. The creation of the debts for which the bonds in suit were issued required a tax beyond the constitutional rate, and in the absence of any recitation in the bonds that they were issued pursuant to the constitution, the court held that the purchaser was bound to know the facts disclosed by the records—namely, the amount of indebtedness of the town, the amount of its taxable property and the rate of taxation necessary. An examination of the records in that case showed that when the bonds were issued the constitutional limit upon indebtedness and taxation had been reached, and that consequently there existed no power in the town to issue the bonds.

In this case, as will be shown hereafter, there is no recitation in the Daviess county bonds that relieved the purchaser from the duty of examining the records of the Daviess county court.

In the case of *the Floyd Acceptances*, 7 *Wallace* 676, this court said:

> "An individual may, instead of signing with his own hand, the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. *But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power must at his peril, see that the paper on which he relies, comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.* These principles are well established with regard to the transactions of individuals. *They are equally applicable to those of the government. Whenever negotia-*

"*ble paper is found in the market purporting to bind the gov-*
"*ernment, it must necessarily be by the signatures of an of-*
"*ficer of the government, and the purchaser of such paper,*
"*whether the first holder or another, must, at his peril, see*
"*that the officer had authority to bind the government.*"

The search has been in vain for a clearer or more distinct statement of the rule that it seems to me ought to be applied to the transaction before us, than that contained in the extract just quoted. It commends itself to the sound judgment and conscience of every man that reads it. Can any good reason be given why the *same rule* applied to the acts of Secretary Floyd shall not be applied to the officers who issued the so called bonds of Daviess county?

"Surely if the acts of any class of officers should be valid only when done in comformity to law, it is those who manage the affairs of towns, counties and villages, in creating debts which not they, but the property owners must pay."

This court said, in the case of *Whitesides vs. The United States*, 93 *U. S.*, 257:

"That although a private agent, acting in vi-
"olation of specific instructions, yet within the
"scope of his general authority, may bind his princi-
"pal, the rule as to the effect of a like act of a public
"agent is otherwise, for the reason that it is better that
"an individual should occasionally suffer from the mis-
"takes of public officers or agents, than to adopt a rule
"which through improper combinations or collusion,
"might be turned to the detriment and injury of the pub-
"lic. *Mayor vs. Eschbork*, 17 *Md:* 282.

"Individuals, as well as courts, must take notice of
"the extent of authority conferred by law upon a person
"acting in an official capacity, and the rule applies in
"such a case that ignorance of the law furnishes no ex-
"cuse for any mistake or wrongful act. *State vs. Hayes*,
"52 *Mo.* 578; *Delafield vs. State*, 26 *Wendell*, 238; *Peo-*

"*ple vs. Bank*, 24 *Wendell*, 431; *Mayor vs. Reynolds*, 20 "*Md.* 10."

The act of the legislature under which the bonds were issued was before the Court of Appeals of Kentucky, on appeal, in the case of the Daviess county court vs. A. G. Howard and others, and the opinion of the court is reported in 13 Bush, 101. The court construing the act held, that the county had no power to *sell* any of its bonds; that it conferred no power upon the county court to issue any bonds in excess of the amount of stock subscribed; that all the bonds issued in excess of the amount of stock subscribed were void; that when the county court issued the bonds of the county to the amount of $250,000, being the amount of stock subscribed, it exhausted all power conferred upon it by the act; that counties had no general power to subscribe for stock in railroads or other corporations and issue bonds, and had no power to do so except by express legislative enactment, and having exercised and exhausted the power conferred, neither the county court or people had or could ratify the issue of bonds in excess of the $250,000. That as neither the people or court, had power to contract, they consequently had no power to ratify, the excessive issue. That the only way the overissue of bonds in this case could be ratified would be by a vote under a legislative enactment. *Marsh vs. Fulton county*, 10 *Wallace*, 684; *McCracken vs. San Francisco*, 16 *Cal.*, 624.

In *Leffingwell vs. Warren*, 2 *Black*, 603, this court said that:

"The construction given to a statute of a State by the "highest judicial tribunal of such State is regarded as a "part of the statute, and is as binding upon the courts of "the United States as the text. Shelby vs. Guy, 11 "Wheaton, 351; McCluny vs. Silliman, 3 Peters, 270; "Green vs. Neill's Lessee, 6 Peters, 291; Ross vs. Du"val, 13 Peters, 45; Massingall vs. Downs, 1 Howard, "767; Nesmith vs. Sheldon, 1 Howard, 812; Van Rens-

"selaer vs Kearney, 11 Howard, 297; Webster vs. "Cooper, 14 Howard, 504."

So, by that the plain terms of the act itself, according to the construction given to it by the highest judicial tribunal in the State of Kentucky, there was *no power* to issue any bonds in excess of the amount of stock subscribed; and all bonds issued in excess of that sum were void.

There were issued bonds amounting to $320,450, and the excess over $250,000 being $70,450 are the void bonds. Many of the valid bonds and about $4,500 of the void bonds had been been paid, returned to the county court and burned before the suit of Howard and others against the county court was instituted, but it is supposed that fact cannot effect the questions involved here one way or another.

The bonds issued may be seen from this table:

Total No. Bonds iss'd.	No. from, to, inc've.	Letter of bonds	Years to run	Am't each bond	Total amt each Series.	Total
511	1 to 511	A	5	$ 50	$ 25,550	
257	1 to 257	B	5	100	25,700	$ 51,250
212	1 to 212	C	10	100	21,200	
88	1 to 88	F	10	500	44,000	65.200
152	1 to 153	D	15	500	76,500	76 500
255	1 to 255	E	20	500	127,500	127,500

Total amount of bonds issued................$ 320,450

The following table shows the bonds which were held by the Daviesss circuit court, after the return of the case, to constitute the overissue and to be void:

Total No of Bonds.	No. from, to, inc've	Letter	Years to run	Am't each bond	Total amt each Series.	Total.
11	501 to 511	A	5	$ 50	$ 550 00	
7	251 to 257	B	5	100	700 00	$ 1,250
12	201 to 212	C	10	100	1200 00	
28	61 to 88	F	10	500	14000 00	15,200
3	151 to 153	D	15	500	1500 00	1,500
105	151 to 255	E	20	500	52500 00	52,500

Total..$ 70,450

The following table shows the dates and amounts of the delivery of the bonds:

	5 yr bonds		10 yr. bonds		15 yr bonds	20 yr bonds	
	A	B	C	F	D	E	Am't
	$50	$100	$100	$500	$500	$500	
1869.	Nos.	Nos.	Nos.	Nos.	Nos.	Nos.	
June 5	1 to 6	1 to 2	1 to 3	1	....	....	$ 1300
July 9	7 to 8	3 to 6	4 to 7	2 to 3	1 to 2	....	2900
Aug 7	9 to 10	7 to 12	....	4 to 5	3 to 4	....	2700
Sept. 4	11 to 13	13 to 16	8 to 17	6 to 7	5 to 7	....	4050
Sept. 22	....	17 to 24	....	....	....	....	800
Sept. 27	....	25 to 28	....	....	....	....	400
Oct. 9	14 to 15	29 to 31	18 to 30	8 to 10	....	....	3200
Oct. 26	....	....	....	11 to 63	8 to 86	1 to 68	100,000
Nov 9	16 to 37	32 to 54	31 to 54	....	....	....	5800
"	38 to 45	55 to 64	55 to 80	....	87 to 96	69 to 70	10,000
1870.							
Jan. 24	....	....	81 to 212	....	....	....	13,200
Feb. 3	....	65 to 257	....	....	....	....	19,300
Feb 4	....	....	....	....	97-153	....	28,500
Feb. 2	46 to 511	....	....	....	....	....	23,300
Feb 17	....	....	....	64 to 88	....	....	12,500
Mar. 22	....	....	....	....	....	71-255	92,500
Total........................							$ 320,450

All these bonds were delivered to the Owensboro and Russellville Railroad Company, except two ten year bonds, Nos. 8 and 9, Letter C, of $100 each, amounting to $200, delivered to John H. McHenry, on September 4th, 1869; eight bonds, Nos. 17, 18, 19, 20, 21, 22, 23 and 24, Letter B, five year bonds of $100 each, amounting to $800, delivered to Mary A. Yewell, on September 22nd, 1869; and four bonds, Nos. 25, 26, 27 and 28, Letter B, five year bonds of $100 each, amounting to $400, making a total delivered to persons other than the railroad company of $1,400.

Section 19 of the Charter *supra* contained this provision:

"*Said bonds to be in such sums, and payable at such* "*times, as said county courts may determine upon.*"

And the Daviess county court, acting evidently under that provision, by its order at the July term, 1868, made $50,000 payable in five years, a like amount payable in ten years and $75,000 payable in fifteen years, and a like sum payable in twenty years.

But if the judgment of the State Court be not binding upon the defendant in error, as is contended, and that provision of the act ~~are~~ is merely directory, and the judgment of the circuit court, in so far as it attempts to separate the good from the void bonds is wrong, the overissue must fall upon the bonds last delivered; and thus it would result that of the twenty year bonds, Nos. 1 to 114 inclusive, were valid, and *the remainder of the twenty year bonds, Nos.* 115 to 255 *inclusive, being* 141 *bonds of* $500 *each, void.*

These were the last bonds delivered.

II.

Estoppel.

We insist that that the county is not *estopped* to show that there was a want of power to issue the bonds in this case in excess of $250,000, either by anything contained in the bonds or otherwise.

The bonds issued were all in the following words—omitting the letter, number, amount and year (See Record, p. 82) to-wit:

"UNITED STATES OF AMERICA:

"COUNTY OF DAVIESS, STATE OF KENTUCKY.

"On account of stock subscribed in the Owensboro "and Russellville Railroad Company.

"—— years after date, the County of Daviess, in the State "of Kentucky, promises to pay to bearer, the sum of —— "dollars, with interst thereon at the rate of six per cent. "per annum, payable semi-annually, upon presentation "of the proper coupons hereto attached, the principal "and interest being payable at the Deposit Bank, Owens- "boro, and to secure the payment of which the property "and credit of the county are pledged.

"In Testimony Whereof, The Judge of the County "Court of Daviess County, has hereto set his hand and "affixed the seal of the said Court, and caused the same "to be countersigned by the Clerk of said "Court, who has also signed the Coupons "hereto attached, this— -day of——, 18——

{SEAL}

"GEO. W. TRIPLETT,
"Judge of County Court.

"T. C. JONES, County Clerk."

Section VI of the Agreement of Facts is as follows: (See Record, p. 25.)

"Each bond had the following endorsement plainly "*printed on the back thereof*:

"This bond is issued as authorized by an act of the Ken- "tucky legislature, approved February 27, 1867, entitled "'An act to charter the Owensboro and Russellville "'Railroad Company, and by an ordinance of the coun- "'ty court of Daviess in pursuance thereof.

"'GEO. W. TRIPLETT,
"'Judge of the County Court of Daviess.'"

Now the *Daviess county court* (composed of the judge and the justices of the peace), was the tribunal authorized to submit the question of subscribing the amount of stock that might be fixed by the commissioners appointed by the legislature, to the voters; to determine whether the proposition received a majority of the votes cast at the election; to make the subscription; to have the bonds of the county issued for the amount of stock subscribed; and deliver them to the railroad company.

The order directed the bonds to be signed by George W. Triplett, the presiding judge of the Daviess county court, and to be countersigned by T. C. Jones, clerk of the county court, and to have the seal of the county court affixed.

But, conceding that this *printed certificate* on the *back* of the bonds, was put there by Triplett's direction, where did he get authority to make it? The *act* of the legislature does not give it, nor does *any order of the county court.* The *county judge* was not authorized by the act to determine the amount of stock, or submit the question to the voters, or decide whether the vote had resulted in favor of a subscription, or to determine the amount of bonds to be issued, or to issue the bonds, and he has no general authority to do any of these things.

The bonds, on their face, do not profess to be issued under any act of the legislature or other authority—the act is not referred to in any way.

The *county judge* has no power from any source whatever, to determine, whether the bonds were issued "as authorized" by the act.

The certificate is not countersigned by the county clerk, nor is the seal of the county court attached to it; and of course it is not the certificate of the committee, Triplett, Berry and Tyler.

As evidence—if it be evidence for any purpose—it is of inferior grade to that of the bond. The bond under seal of the county, signed and countersigned, ought not to be enlarged or effected by this other writing endorsed without authorization, and signed only by Geo. W. Triplett, judge of the Daviess county court.

It will be urged doubtless, that the certificate imports a consideration, being in writing, but, a consideration to whom? Certainly not to the county, for the county has given no authority to any one to make it.

If the certificate had been signed by Triplett, countersigned by the county clerk, and had the seal attached to it, or, if it had not been signed at all, it could with more plausibility be contended that it is a part of the bond. *But the fact that it is executed in a form different from the bond, negatives the theory that it is, or was meant to be, any part of the bond itself.*

As a separate and independent instrument it is entitled to no consideration for the reason that, *it was made without authority.*

Any other person in the country had as much authority to make the indorsement as Judge Triplett.

It is unnecessary to inquire whether it effects Triplett personally, since he is not a party to this suit.

There is no case, so far as I have been able to find, decided by this court, that has held that the county was estopped by a recitation like this one, not in the bond as a part of it, but on the back of it.

In *Kennicott vs. The Supervisors,* (16 Wallace, 452), the rule was thus stated:

"If an election or other fact is required to authorize the "issue of the bonds of a municipal corporation, and if "the result of that election, or the existence of that fact, "is by law to be ascertained and declared by any judge, "officer or tribunal, and *that* judge, officer or tribunal, on "behalf of the corporation, *executes or issues the bonds,* "*with a recital,* that the election has been held, or that "the fact exists or has taken place, this will be sufficient "evidence of the fact to all bona-fide holders of the "bonds."

In *Knox County vs. Aspinall,* (21 Howard, 529), which was a case of municipal subscription of stock in a railroad company, the statute upon which the subscription there purported to rest, made the existence of certain facts essential to the exercise of authority to make the subscription and issue bonds therefor. The bonds, *upon their face*, however, recited that they were issued in pursuance of the statute which prescribes the conditions precedent to any subscription, and this court said they imported a compliance with the law under which they were issued.

And in *County of Moultrie vs. Savings Bank* (92 U. S., 636); *Mercy vs. Township of Oswego* (Ibid, 638); *Town of Coloma vs. Eaves* (Ibid, 484); *Humboldt vs. Long, et al*, (Ibid, 641); *Orleans vs. Pratt* (99 U. S., 676), the bonds all contained on their face, recitals in substance that they were issued in pursuance of, or in accrodance with the statute authorizing their issual, giving its title, &c., and in some reciting the existence of the specific precedent conditions upon which the exercise of the power depended.

In the case last cited it is said that:

"Where the bonds *on their face recite the circumstances* "*which bring them within the power*, the corporation is es- "topped to deny the truth of the recital."

In all these cases the court lays special stress upon the fact that if the bond, in the body of it, and as part of its covenant, if issued by the tribunal or person having authority to determine whether the precedent condition has in fact been complied with, contains a distinct statement to that effect, such statement cannot be denied by the corporation, after the paper passes into the hands of a purchaser before maturity for a valuable consideration.

MR. JUSTICE BRADLEY, in a concurring opinion in *Coloma vs. Eaves*, (92 U. S., 493) states the rule as follows:

"If when the law requires a vote of tax-payers, before "bonds can be issued, the supervisor of a township, or "the judge of probate of a county, or other officer or "magistrate, *is the officer designated to ascertain whether* "*such vote has been given, and is also the proper officer to ex-* "*ecute, and who does execute, the bonds, and if the bonds* "*themselves cantain a statement or recital that such vote has* "*been given*, THEN *the bona-fide purchaser of the bonds need* "*go no farther.* He has a right to rely on the statement "as a determination of the question. But a mere execu- "tion and issue of the bonds *without such recital is not, in* "*my judgment, conclusive.* It may be *prima facie* sufficient; "*but the contrary may be shown.* This seems to me to be "the true distinction to be taken on this subject; and I "do not think that the contrary has ever been decided by "this court. There have been various *dicta* to the con- "trary; but the cases, when carefully examined, will be "found to have had all the prerequisites necessary to sustain "the bonds according to my view of the case. This view "was distinctly announced by this court in the case of "*Lynde vs. The County of Winnebago*, (16 Wall, 13.)"

And Mr. Justice Matthews, in delivering the opinion of the court in *Dixon county vs. Fields*, (111 U. S., 94) says:

"The converse is embraced in the proposition and is "equally true. If the officers authorized to issue bonds, "upon a condition, are not the appointed tribunal to de- "cide the fact, which constitutes the condition, their re- "cital will not be accepted as a substitute for proof. In "other words, where the validity of the bonds depend "upon an estoppel, claiming to arise upon the recitals of "the instrument, the question being as to the existence "of power to issue them, it is necessary to establish that "the officers executing the bonds had lawful authority to "make the recitals and to make them conclusive. The "very ground of the estoppel is that the recitals are the "official statements of those to whom the law refers the "public for authentic and final information on the "subject."

And in *Buchannan vs. Litchfield*, (102 U S., 292), the court says:

"Returning to the case in hand, it will be observed "that the bonds issued by the city of Litchfield contain "no recital whatever of the circumstances which, under "the constitution of the State, must have existed before

'' the city could legally incur the indebtedness for which '' the bonds were issued. They purport, it is true, to be '' issued under the authority of the act of April 15, 1873, '' and in pursuance of the ordinance of the city based upon that statute. But that statute does not especially '' restrict the exercise of that power to erect and maintain a system of water works to cases in which the aggregate indebtedness of the city was within the limit '' which the constitution declares no municipal corporation should exceed. Nor does the city ordinance recite or state, even in general terms, that the proposed '' indebtedness was incurred in pursuance of or in accordance with the constitution of the State, or under the '' circumstances which permitted the issue of the bonds. '' Consequently a recital that the bonds were issued under '' the authority of the statute, and in pursuance of the '' city ordinance, did not necessarily import a compliance '' with the constitution.

'' * * * * * * * * *

'' Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds further than would be consistent with '' reason and sound policy, and farther than we are now '' willing to go. The present action cannot be maintained '' unless we should hold that the *mere fact* that the '' bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, was, in itself, conclusive proof, in favor of a '' *bona fide* holder, that the circumstances existed which '' authorized them to be issued. We cannot so hold."

In *Hayes vs. Holly Springs*, (114 U. S., 126-7), it is said that:

'' Even a *boua fide* holder of a municipal bond is bound '' to show legislative authority in the issuing body to create the bond. *Recitals on the face of the bond* or acts *in* '' *pais*, operating by way of estoppel, may cure irregularities in the execution of a statutory power, *but they can-*

"*not create it.* If, as in the present case, legislative authority was wanting, the bond has no validity."

The bonds in that case contained an elaborate recital on their face, that they were "issued in pursuance of an order of the Board of Mayor and Aldermen of the city of Holly Springs, Marshal county, State of Mississippi, made under the authority of the constitution of Mississippi, and the laws of the legislature of the State of Mississippi, and authorized by a vote of the people of the said city of Holly Springs at a special election held for that purpose."

The city "for several years continued to levy and collect taxes for the payment of the interest accruing on the bonds and took up the coupons as they fell due, and voted the stock so subscribed, in the election of directors of the company, and in all the stockholders' meetings of the company."

This case seems to me to proceed upon the principle that except as the agent of the municipality, and the municipality had power to issue the bonds neither the municipality or its agent, can make any representation, or do any acts that amount to, or create an estoppel; that the power to contract—to issue the bonds—is the higher or primary power and the power to estop a resultant power, flowing out of the primary power to contract. That if there is no power to contract, there is no power to create estoppel.

This view seems to me to be sustained also by the case of *Dixon county vs. Field*, (111 U. S., 94.)

The case we have here presents, it is believed, a different state of fact from any that has been before the court. There was, it is conceded, power to issue bonds to the amount of $250,000, but it is earnestly insisted that when that amount had been issued and delivered, the power which had vested in the county court, *was exhausted.* But in fact so far as the county court is concerned, it never did in any form attempt to authorize the issual of any bonds in excess of $250,000. The overissue was the work alone of Geo. W. Triplett, presiding judge, and Thomas C. Jones, county clerk. Those persons derived all the authority they had from the order of the county court made at its July term, 1868. No semblance of authority appears elsewhere or ever had existence. That authority was limited, as positively, and specifically, as it was possible to do it. By what process of reasoning, can the result be reached, that the wholly unauthorized acts of these officials, can constitute any enforceable obligations or contracts against the county of Daviess? The *power* of the *county* was at an end, and likewise, that of all agencies of the county, whether county court, county judge, county clerk, committee, or all combined. "The servant is not greater than his lord."

If the overissue—not bonds, no more in legal effect than merest forgeries—can be upheld, then the property of the tax-payers of every municipality in the country is completely at the mercy of ignorant, careless, rash or corrupt officials in the issual of municipal bonds. The legislatures of the States can place no limitations upon the power to issue such paper that can be made effectual. If those officers may, without authority, issue bonds to the extent of $70,450, that are enforcible against the county, what shall prevent the next issue from being $70,000,000 and thus bankrupt it?

This court held in the *Floyd Acceptance Cases*, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negegotiable, and if no such authority existed it could not be aided by giving the paper that form—"that the protection which "commercial usage throws around negotiable paper can- "not be used to *establish the authority* by which it was "originally issued."

And in *Hayes vs. Holly Springs*, that "even a *bona fide* "holder of a municipal bond is bound to show legislative "authority in the issuing body to create the bond." And that while "Recitals on the face of the bond, or acts *in* "*pais*, operating by way of estoppel, may cure irregular- "ities in the execution of a statutory power, *they cannot* "*create it.*"

Now when bonds had been issued for $250,000, the limitation upon the power was reached, and the county then, when that amount was issued, was as completely without legislative or other authority as it was before the act was passed. And the county being without power, of course, all agencies of the county were equally impotent.

Neither the act or any order of the Daviess county court empowered Judge Triplett to issue the bonds, or determine whether any condition had been performed. Neither the law or the court authorized or attempted to authorize him to state that the bonds or any of them were issued as authorized by the act or orders of the court; and every bondholder, whether the first or any subsequent holder, is bound to know this. The county court limited the issue and delivery of the bonds to $250,000. The delivery up to the authorized amount must be taken to be a delivery made by the court. But the court had no authority to deliver more than the amount af $250,000. After this amount had been delivered, the county court and all the people of the county combined, could not deliver any more bonds.

After a patient search I have been unable to find a single case, which fairly construed with reference to the facts of it, that proceeds upon any principle which, applied to this case, will hold the bonds issued in excess of $250,000 to be valid. On the contrary many cases, and I think in fact, all the cases decided by this court on the subject, when closely examined and construed with reference to the exact facts before the court, proceed upon principles which when applied to this case must render the overissue of bonds void.

General expressions may be found in many cases which, at first blush, would seem to almost sanction the doctrine that if bonds are issued containing recitals that they are issued according to law, that one who, if the bonds were valid, would be a *bona fide* holder, may collect them, but all such expressions will be found upon a careful examination to be *dicta*.

The court said in *Northern Bank vs. Forter Township*, (110 U. S., 615), that:

"An examination of the cases in which those general "expressions are found, will show that the court has never "intended to adjudge that mere recitals by the officers of "a municipal corporation in bonds issued in aid of a "railroad corporation precluded an inquiry, even where "the rights of a *bona fide* holder were involved, as to the "existence of legislative authority to issue them."

And it is also said that it is "a maxim not to be disregarded that general expressions, in every opinion are to "be taken in connection with the case in which those expressions are used. If they go beyond the case, they "may be respected, but ought not to control the judgment on a subsequent suit when the very point is presented for decision." *Cohens vs. Virginia*, 6 Wheaton, 399; *Carroll vs. Carroll's Lessee*, 16 Howard, 287.

It can be confidently asserted that in no case decided by this court, has it been held that bonds were valid, because of recitals or acts *in pais*, where there was no power to issue them. Mere irregularities in the exercise of the power may be aided or cured by recitals and acts *in pais*, but power cannot thus be created.

If the so called bonds of Daviess county issued in excess of $250,000, are held to be valid, the court must in order to do so, unless I have wholly misapprehended the cases, go very much farther than it has in any previous case.

When the limit was reached the power was exhausted, and likewise all power to make any representations, or do any further thing relative to bonds. Those officers who had issued the valid bonds might after that go through all the manoeuvres of issuing bonds, but it was mere pantomime.

Neither the county court or its committee, Triplett, Berry and Tyler, make any recitations in or on the bonds. Nor do Triplett and Jones, the persons who were to sign the bonds and affix the county seal, make any.

In ascertaining the overissue, if this court adopts the mode of the State court, then the plaintiff was entitled to a judgment for only $6,000 and interest.

If it shall hold that the overissue comes out of the last bonds delivered, then numbers 115 to 255 of the twenty year bonds are void, and the 92 coupons cut from 23 of twenty year bands, numbered 151, 152, 153, 157, 161, 163, 166, 167, 171, 175, 176, 202, 211, 214, 217, 218, 219, 222, 229, 238, 239, 244 and 245, amounting to $1,380, are likewise void, and the judgment of the court below is erroneous to this extent with interest calculated up to the date of the judgment amounting to $1,618 30.

III.

RATIFICATION.

Much of what has been said in the paragraph on estoppel is equally applicable here. But it will no doubt be urged for the defendant in error here (as I understand it was in the circuit court) that the overrissue has been ratified by the *county court* in levying taxes and paying interest and a small portion of the overissue, and also by the *taxpayers or people* of the county in paying taxes for that purpose, it is therefore deemed proper to say something on this point.

I contend that there was no ratification of the excessive issue, because there was no power to contract.

Section nineteen of the act shows, that the power of levying and collecting taxes was limited to the payment of the stock subscribed, or limited to the payment of the bonds, and the issue of the bonds is limited to the amount of stock subscribed.

So that whether the stock should be paid by a levy of tax without the issual of bonds, or bonds were issued and taxes levied for their payment, the power in either case was limited to the amount of stock subscribed.

The people and the county court, of Daviess county, were alike powerless to contract for the stock, or issue bonds or levy taxes for the payment of the bonds except as the act of the legislature enabled them to do. Neither the people or the court had any power to fix upon the amount of stock to be taken. This was to be done by the commissioners appointed by the legislature for that, and other purposes. The people could then accept or reject the proposition to subscribe. If the vote was favorable to the proposition, then and *only* then, did any power rest in the county court to make the subscription and even levy a tax to pay it, or to issue bonds for the amount of stock subscribed and levy a tax to pay the bonds with interest.

And it will be seen that the only levy of taxes made (so far as the record shows) was made at the county court at its July term, 1868, in the same order wherein the bonds of the county were directed to be issued to the amount of only $250,000, and consequently in so far as the county officials paid these funds on either the principal or interest of the overissue it was simply a misappropriation of public money to a purpose entirely different from the one for which it was levied by the court and paid by the people. Therefore, to the extent the county court paid out of the taxes, any interest on or principal of, the overissue, it was without authority and in violation of law.

To permit such acts as these—done without authority and in violation of law—to create estoppel or ratification, would be as it seems to me, to hold, contrary to all the decisions of this court, that while power to contract directly was necessary, yet though none in fact existed, a contract might be made in an indirect way, by performing acts that apparently sanction what was wholly void from the beginning. This theory is utterly uttenable. It has been expressly repudiated by this court. (See *Marsh vs.*

Fulton county, (10 Wallace, 684) and *Hayes vs. Holly Springs* (114 U. S., 120.)

The Court of Appeals of Kentucky in the case of *Daviess county court vs. Howard and others*, in discussing the question of ratification of these same spurious bonds, say:

"The *voters* of the county had no right to assume the "burden, except in the manner provided in the act. They "could not ratify an act that neither the county court or "themselves had the power to perform.

"If the principal could not exercise the right, it is difficult to perceive how his sanctioning its exercise by an "agent could make it legal. *In making the overissue the "county court or its committee acted beyond the scope or its "agency, and outside of the power given by the legislature.* "The only way in which the people could ratify it would "be by a vote under a legislative enactment."

The people, and the court, being powerless to contract, it results inevitably that they were equally powerless, the one or the other, or both combined, to sanction or ratify.

"A ratification," said this court, in *Marsh vs. Fulton county*, (10 Wall, 684), "is in its effect upon the act of an "agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in "the same manner as though the authority of the agent "to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance, without the "previous sanction of the qualified voters of the county. "The supervisors in that particular were the agents of the "county. They could not, therefore, ratify a subscription "without a vote of the county, because they could not "make a subscription in the first instance without such "authorization. It would be absurd to say that they "could without such vote, by simple expressions of ap-

"proval, or in some other indirect way, give validity to "acts, when they were directly in terms prohibited by "statute from doing those acts until after such vote was "had. That would be equivalent to saying that an agent "not having the power to do a particular act for his prin-"cipal could give validity to such act by its indirect rec-"ognition. *McCracken vs. San Francisco*, (16 California, 624.'')

Among the various acts relied upon by Marsh in that case, as constituting a ratification, was the payment of interest upon the bonds for several years and a payment of some of the bonds themselves, out of taxes levied and collected from the people of Fulton county.

It is therefore respectfully submitted, that the judgment of the court below is erroneous and ought to be reversed and that a new trial ought to be awarded.

GEO. W. JOLLY,
Attorney for Plaintiff in Error.

117-657

Office Supreme Court U. S.
FILED.
MAR 29 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

October Term, 1885.—No 186.

THE COUNTY OF DAVIESS,
Plaintiff in Error,

vs.

J. M. DICKERSON,
Defendant in Error.

Argument of J. D. Atchison, for Plaintiff in Error.

Gray & Clarkson, Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1885.—No 186.

THE COUNTY OF DAVIESS,
Plaintiff in Error,

vs.

J. M. DICKERSON,
Defendant in Error.

ARGUMENT OF J. D. ATCHISON, FOR PLAINTIFF IN ERROR.

STATEMENT.

February 27th, 1867, the legislature of Kentucky chartered the Owensboro and Russellville Railroad Company by an act, the 1st section of which appointed commissioners, referred to in the 19th section of said act, which reads as follows:

"Section 19. That the county courts of Daviess, Ohio, McLean, Muhlenburg and Logan counties, shall have power, and are hereby authorized, to subscribe to the capital stock of said company, in such number of shares as may be determined by said county courts respectively, and to levy on the taxpayers of such counties respectively such taxes as may be necessary to pay the stock so by them respectively subscribed; and said county courts may, if they shall deem it prudent, issue the bonds of said counties respectively *for the amount* *of stock subscribed*, or any part thereof, said bonds *to be in such sums and payable at such times as said county courts may determine*. But before such stock shall be subscribed by said county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock, and the *amount thereof*, (to be suggested and fixed by the Commissioners named herein in each of said counties,) at an election to be held on the third Monday in April, 1867, in each of the counties aforesaid, due notice of which shall be given by the sheriffs in each of said counties, by written advertisement posted in each of the voting precincts thereof, for at least thirty days before said day of election ; and said stock shall not be subscribed unless a majority of all the votes cast at said election be in favor of such proposition ; and said courts have power to appoint suitable and necessary officers to conduct such election, and to provide for the collection of the tax aforesaid, if the majority of the votes cast at such election is in favor of the proposition aforesaid."

Section 20 provides that on payment of such taxes the taxpayer shall receive a certificate of stock and to that extent be substituted to the rights of the county as a stockholder in said company.

After it was determined to issue the bonds of Daviess county, section 20 was amended by the legislature so that no stock should be issued to the taxpayer for the part of tax by him paid which went to paying off the interest. No other part of said act refers to or affects the questions at bar.

March 15th, 1867, the committee named in the 1st section of said act, and referred to in the 19th section thereof, suggested to the Daviess county court and *fixed* the amount of stock to be subscribed :

"The undersigned commissioners for Daviess county suggest to the Daviess county court that said court submit the proposition to the voters of Daviess county under the charter incorporating the Owensboro and Russellville Railroad Company, that said voters instruct said county court to subscribe ten thousand shares to the capital stock of said company." (Record, p. 18.)

On that day the said court entered of record the following order, submitting said proposition to the voters of said county:

"Pursuant to an act of the General Assembly of the Commonwealth of Kentucky, entitled an act to charter the Owensboro and Russellville Railroad Company, approved February 27th, 1867, it is ordered and adjudged by the county court of Daviess county that there shall be, and there is hereby, submitted to the voters of said county the proposition: 'Shall or shall not the county court of Daviess county subscribe *ten thousand* shares, being the sum of two hundred and fifty thousand dollars, to the capital stock of said Owensboro and Russellville Railroad Company?' To be voted and determined upon by said voters at an election to be held in each of the voting precincts of said county on the third Monday in April, 1867; and the sheriff of Daviess county is required to notify the voters of said county of said election by written notices posted in each of said precincts for thirty days before the day of said election." (Record, p. 19.)

October 17th, 1867, the railroad company moved the court to subscribe $250,000 to the capital stock of said company, the vote taken under said election having resulted favorably. (Record, p. 20.)

April 13th, 1868, said county court ordered the judge thereof to subscribe for the county to the capital stock of said company $250,000 (Record, p. 21), and on June 13th, 1868, it was determined to issue the bonds of said county in payment of the stock subscribed. (Record, pp. 22 and 23.) From said order we quote the following:

"It is ordered that George W. Triplett, presiding judge of Daviess county court, William B. Tyler and E. C. Berry be and are hereby appointed a committee on behalf of the county court of Daviess county to have bonds executed and prepared of a sufficient amount to satisfy and pay off the subscription on the part of the county of Daviess to the Owensboro and Russellville Railroad Company, *that said bonds be executed and made payable as follows, viz:*

"Fifty thousand dollars five years from date.

"Fifty thousand dollars ten years from date.

"Seventy-five thousand dollars fifteen years from date.

"Seventy-five thousand dollars twenty years from date."

Again, "It is further ordered that whenever any bond shall be sold or otherwise disposed of by said committee for the purposes aforesaid, that a list of said bonds shall be made, giving the amount, number, and denomination of same, with the amount of coupons attached to each at the time of their disposal; *and said list so furnished shall be entered upon the records of the county court of Daviess by the clerk of same.*" Said order also provided that "said bonds shall be signed by the presiding judge of Daviess county, and the *clerk of the county court of Daviess county, and have the seal of the county impressed on each.*"

The said committee, instead of executing bonds as directed in said order, executed bonds as follows, viz:

Of five-year bonds	$51,200
Of ten-year bonds	65,200
Of fifteen-year bonds	76,500
Of twenty-year bonds	127,500
Making a total of	$320,400

Instead of $250,000, as authorized by the vote under the enabling act and the order of the county court. But there was returned and canceled bonds to the amount of $3,000, so that the actual excess which went out was $67,500.

We note here how much this excess of bonds increased the burden of the county over and above that which it assumed. Had the bonds been issued as authorized, then we have:

$50,000 five-year bonds at 6 p. c., amounting to....	$45,000
50,000 ten-year bonds at 6 p. c., amounting to.....	80,000
75,000 fifteen-year bonds at 6 p. c., amounting to.	144,500
75,000 twenty-year bonds at 6 p. c., amounting to.	165,000
Or a total assumed authorized liability of.........	$434,500

Instead of which it is asserted that we must, without authority of law, and without our consent, assume the following liability:

$51,200 at five years, amounting to........................	$46,560
65,200 at ten years, amounting to....................	104,320
76,500 at fifteen years, amounting to................	147,350
127,500 at twenty years, amounting to................	280,500
Making a total of:......................	$578,730

From which deduct the bonds returned with interest, amounting to $5,700, and we have the debt sought to be imposed, $573,030; from which deduct the amount of the debt authorized, $434,500, and we have a net excess of $139,530. This we are told is a mere irregularity, that notwithstanding the committee and the county as well were limited in the power granted, all of which had been exhausted, yet, by some miracle similar to the Biblical flour barrel, it still holds out after it had all been consumed. If this be true, then, like Tennyson's brook, it might have "run on forever."

Record from pages 72 to 77 shows the register of bonds entered on the public records of the county, as they were delivered pursuant to the order of the county court, found on page 22 of Record, and agreed fact XVI, Record, page 30, shows that this registration was properly made.

Record, page 31, shows a tabulated statement of the delivery of bonds taken from the said bond register. From this it will be seen that prior to February 17, 1870, when the bonds sued on, marked F, and numbered from 61 up, were delivered, there had already been delivered and registered the full amount of $50,000 of ten-year bonds.

The bonds sued on, marked F, ranging in numbers from 4 to 60, were not defended against, and to that extent the judgment has been paid off. It also likewise appears that prior to the delivery of bonds D, numbered 51, 52 and 53, from which four sets of coupons sued on were detached, there had already been delivered and registered the full amount of $75,000 of fifteen-year bonds, the fact being that each bond was delivered and registered according to its serial number, beginning at bond numbered 1. It also appears that prior to the delivery of the twenty-three bonds, ranging in numbers from 151 to 245, from which the twenty-three sets of coupons sued on were detached, there had been already delivered and registered the full amount of $75,000 of twenty-year bonds.

It occurs to us that the committee were clearly limited by said order to the amount of bonds due at the times fixed by the said order, and that when they had executed and delivered the amount of five-year bonds directed in said order, their authority to make five-year bonds ceased, and so with the other classes.

But if the court shall hold that this rule does not apply, then it appears from said table that prior to March 22, 1870, there had been delivered—

Of five-year bonds	$51,200
Of ten-year bonds	65,500
Of fifteen-year bonds	76,500
And of twenty-year bonds	35,000
Aggregating in all	$227,200
Deducting bonds canceled	3,000
We have	$224,200

Deducting which from $250,000, the amount authorized, we have $25,800 to be delivered on March 22d, 1870. But prior to said date there had been delivered and registered 70 bonds, series E, for $500 each, due in twenty years, so that on said day the committee could deliver only 51 more $500 bonds, and one $300 bond, making the serial numbers from 70—the number of the last bond of that series which had been delivered—to 121 of $500 each, and one bond of $300, to be numbered 122. But the Record shows (p. 30) that the 23 bonds at twenty years, letter E, from which the 92 coupons sued on were detached, are numbered all above 150. These bonds being delivered and registered according to their serial numbers, beginning at 71, the full amount allowed, had been reached before any of the above bonds were made. These bonds, delivered March 22d, 1870, were not all delivered at once, but by the proof (Rec. p. 30, agreed fact XVI), *they were delivered and registered by their numbers, beginning at the lowest.* Can it be possible that because the last delivery was all made on the same day there can be no limit to it? We can ascertain the limit as exactly on that day as if each bond had been delivered on a separate day.

The county of Daviess paid off the entire issue of five-year bonds, and also paid the interest on all the bonds issued until January, 1877. But May 12th, 1875, there was filed in the Daviess circuit court the following-styled cause:

Allen Gallatin Howard, Thomas Minarch, Curbin Balee, Alexander McMurtry, and Orville O. Brown, resident citizens, voters and taxpayers of Daviess county, Kentucky, who sue in behalf of themselves and all the citizens, voters and taxpayers of Daviess county, State of Kentucky, plaintiffs,

against

The Davies County Court, the Owensboro and Russellville Railroad Company, now the Evansville, Owensboro and Nashville Railroad Company, and C. D. Jackson, James

Wier, J. H. Smith, the Deposit Bank of Owensboro, Ky., the Planters' Bank of Owensboro, Ky., and all other owners of the bonds of Daviess county issued in discharge of a pretended subscription to the said railroad company, which owners, together with their names, are unknown to plaintiffs, defendants. (See Record, p. 33.)

Service was duly executed on the Daviess county court and others, and a waiving order duly entered as directed by the Kentucky Code of Practice. (Record, p. 49.) And on January 24, 1876, the circuit court rendered a judgment which determined that the county had no authority or power under the act of February 27th, 1867, and the vote taken thereunder, to issue bonds of said county in excess of $250,000, and that said court had no power to impose taxes to pay either principal or interest of bonds in excess of said amount. (Record, pp. 95, 96, 97.)

The county court, still presided over by the same Triplitt who issued these bonds, excepted to this judgment and prosecuted an appeal to the court of appeals of Kentucky, which is the highest judicial tribunal of said State, and said court of appeals, on March 30th, 1877, affirmed the decree of the court below in a lengthy and well-considered opinion, which is quoted in full in Mr. Jally's brief filed herein, beginning at page 7.

The defendant in error filed his suit at law in the circuit court of the United States on the 3d day of April, 1879, and after the adjudications aforesaid in the State courts, and he fails to show that he had purchased his bonds before the decision of the court of appeals was rendered in the matter.

In view of the foregoing state of facts and the errors assigned herein, we respectfully submit to the Court the following

ARGUMENT.

First we submit the following propositions:

1. County courts in the State of Kentucky are sub-governmental agencies and possess only such powers as are specially and expressly delegated to them by the legislature, which powers so delegated for general purposes do not authorize them to take stock in railroad companies, nor to issue the bonds of the county for such or any other purpose, nor to levy and collect taxes for such purposes.

2. The act of February 27th, 1867, was conditional on the will of the voters, its powers were dormant and could not be awakened or vitalized only in the manner and to the extent pointed out by the act and ratified by the voters.

3. Neither said act, nor the vote taken pursuant thereto, nor the Daviess county court, authorized the issue of bonds for said purpose in excess of $250,000, and that all bonds issued in excess of said sum are absolutely void for want of power to make them, because:

4. Said act authorized the county court to subscribe only the amount "*to be suggested and fixed*" by the commissioners named therein, provided a vote on such proposition should be in favor of it, and said committee did suggested $250,000 and no more, and the proposition submitted to and ratified by the voters was for said amount and no more, and because the act provided that the county court might issue the bonds of the county "*for the amount of stock subscribed or any part thereof*," and to this it was limited.

5. Where there is no power to issue bonds of a municipal corporation, bonds so issued are for that reason absolutely void *ab initio*. No recital in such bonds, and no payment of interest on them by the unwilling tax-payers can supply this want of power nor vitalize that which never had a source of life.

6. To such bonds the doctrines of municipal decision, equitable estoppel, and *bona-fide* holders has no application. Such doctrines apply only in cases where there has been a defect or irregularity in the performance of conditions precedent required by the enabling act, but not to cases where there is absolutely no power to make the bonds.

7. There can be no difference in a case where municipal bonds are issued without any authority and a case where such bonds are issued in excess of authority. In the first instance the authority does not exist because it has never been granted ; in the second instance it does not exist because it is withheld beyond the limit fixed, and the limit being reached, all of the power delegated is exhausted.

8. The State courts having first gotten possession of the subject, and the highest judicial tribunal of the State by its decision in a cause in which it had undoubted jurisdiction, both of the necessary parties and the subject-matter, of the action, has determined : (1) that stock could be subscribed only to the amount fixed in the proposition submitted and assented to by the voters ; (2) that it could issue bonds only to the *amount of stock* subscribed ; (3) that it had no power to sell these bonds ; (4) that the county court was not clothed with power to levy and collect taxes from the people only to the extent of the amount voted by them ; (5) enjoining perpetually the county court from making such levies of taxes ; and (6) that there had not been and could not be any ratification of the excess of bonds by the county, except by a vote of the people under an act of the legislature authorizing it. This being a construction by the highest State court of one of its statutes involving the question of taxation which partakes so fully of State sovereignty, it becomes a part of the text of the statute, and this court will follow the decision of the State court.

9. The powers to issue the bonds and to levy taxes for their payment are co-extensive, and to give judgment on the bonds would be in effect to compel the county court to levy

taxes for its payment, which would force the county court into a contempt of the perpetual injunction awarded by the State court, a thing which this court, in such cases, has always refused to do.

10. The power to levy taxes being limited to the amount of bonds authorized, to give judgment on the unauthorized bonds would be in effect the creation of the power of taxation, and its conferment by the federal court upon a department of the State government. Such is repugnant to our complex system of government.

I. The first, and, as we regard the subject, the most important question is that of *power* in the committee to issue the bonds in excess of $250,000.

Sec. 30, art. 2, of the Constitution of Kentucky, provides "that the Legislature shall not authorize any debt to be contracted on behalf of the State except for the purposes named in sec. 35 (which does not apply here), unless the act shall provide for the levy of a tax to liquidate such debt within thirty years, nor unless said act shall be first submitted to a vote of the people."

If the Legislature itself cannot create a State debt except in a provided method, surely it cannot delegate such powers to any of the sub-governmental agencies of the State; it cannot confer on its agents a power which it does not itself possess, and which is inhibited by the Constitution.

The court of appeals of Kentucky, in B. E. & M. R. R. Co. *vs.* Warren Co. Ct., 10 Bush., 718, held that "the county court, held by the county judges or by the judges in conjunction with the justices, has no power to enforce a tax in aid of railroads on the people of the county, or to submit the question of taxation to a popular vote, without some special legislative enactment." And the same court says: "The power to tax is a high governmental power, but, fortunately for the people, it cannot be exercised by the legislative authority without *limit;* and when the Legislature grants this high power to another tribunal it can only be exercised in *strict conformity to the terms in which the power is granted*, and a departure in any material part will be fatal to the attempt to exercise it." (Judge of Campbell Co. Ct. *vs.* Taylor, 9th Bush., 206.)

It will thus be seen that in Kentucky there resides in county courts no inherent power to subscribe stock, issue bonds, or levy taxes in aid of railroads.

These are courts of limited jurisdiction and derive all their power from express legislative enactment. (Martin *vs.* McKenny, Sneed, 321 ; Gilbert *vs.* Bartlett, 9 Bush., 53.)

So we take it as well settled in Kentucky, as well as by the decisions of this Court that in States having similar constitutions to Kentucky, there is vested in counties and cities no general power to issue bonds for railroad purposes. So that in the case at bar we must look to the act of February 27th, 1867 alone to ascertain the power delegated to make the bonds in question.

Taking the act alone, we have a legislative construction of it in itself—it is self-construing. The county court might submit to the voters the amount suggested by the committee, which was $250,000 ; if the vote resulted favorably, the court might subscribe that amount, and might issue the bonds of the county *for the amount subscribed.* There was a plain limitation. The Legislature fixed a committee who should suggest the amount ; upon this amount a favorable vote must be had before the act had any effect whatever. It was plainly the intent to let the people know what amount of debt they were about to incur by their vote, and to withhold the power if the vote should be adverse to the proposition. When they voted they also had the provided protection of a public law that there could be issued bonds only to the amount named in the proposition ratified by them. They were not only left by the act to say whether they would incur any debt on this account, but also to say what *amount* of debt they would incur.

This construction of the act is interpreted and made plain by the twentieth section of the act as amended, which provides that for all taxes paid, except so much as will pay the interest on the bonds, the tax-payer shall receive stock in the railroad company, and to the extent he receives such stock shall be substituted to the rights of the county as stockholder in the company. Where could the stock come from to be given to the tax-payer for the over-issue of bonds?

Under a similar act and in a similar case this court has given a like construction. Wells *vs.* Supervisors, 102 U. S., 625, was a case where the enabling act provided that the board of police were authorized, after a favorable vote, to subscribe the amount voted, viz, $150,000, and to levy and collect a tax "for the payment of the capital stock so subscribed." The act also provided that when any person should hold certificates of taxes paid equal to a share of stock, upon presenting them he shall receive stock to the amount of taxes paid. This court held the bonds void, notwithstanding the recital to which we shall presently refer, and moreover held that no power existed "*to levy and collect taxes only to the amount of stock subscribed,*" and the court said this was manifest from the further provision that the railroad company shall issue stock to the tax-payers to the amount of taxes paid. These bonds had twenty years to run, and the interest on the $150,000 would make the amount $390,000. How could the company deliver out of $150,000 of stock dollar for dollar stock for $390,000 of taxes paid? We perceive no difference in principle in these cases. In the case at bar the act provided that the tax-payer should receive no stock for the taxes paid to liquidate interest, but that he should receive dollar for dollar in stock for all taxes paid to liquidate the principal of the bonds.

Under a statute of Kentucky authorizing a subscription to the capital stock of a railroad company, on condition that the *holders of real estate* in the county should, by a majority vote in favor of the proposition, the proposition was submitted to a vote of *all the legal voters* of the county and resulted favorably, the stock was subscribed and the bonds issued. The court of appeals of the State held that under such state of case the county court had no power to levy taxes to pay these bonds. And in the same case it was held that where the enabling act providing that "before the subscription should be made or the tax levied, the question of levying the tax should be submitted to the voters of the county, and if a majority of the votes cast should be in favor of the tax, it should be levied," the vote was taken on the proposition to subscribe stock alone, and it was held that no levy of taxes could be made to pay bonds which had been issued and delivered to the company. (Bullock *vs.* Curry, 2 Metcalf, 174.) In this case the question of the validity of the bonds was not made a consideration, but the case serves to show how strongly the courts of this State construe such statutes against the abuse of delegated powers. The rule is stated as follows: "In all essential particulars the provisions of an act authorizing a municipal corporation to subscribe for stock in railroad companies and to issue bonds in payment thereof must be complied with, and if not followed the bonds will be void unless cured by subsequent legislation." (W. & Mt. S. T. P. R. R. Co. *vs.* Clark Co. Ct., 3 Metcalf, 141; Shelby Co. Ct. *vs.* C. & O. R. R. Co., 8 Bush., 216.)

In Daviess County Court *vs.* Howard, &c., 13 Bush., 101, the court construing this statute says: "The power to issue bonds was limited in amount to the sum subscribed by the county to the capital stock, and the county court, looking to the extent of the power with which it was clothed by the act in question, designated the number and amount of bonds by an order of that court made July, 1868. This order directed the execution of bonds for $50,000 payable in five years, a like amount payable in ten years, $75,000 payable in fifteen years, and a like sum payable in twenty years, with interest coupons attached, payable semi-annually." And again: "The act expressly authorized the county court to *issue* *bonds for the amount of stock* subscribed; but we find no power conferred by the charter upon the county court to issue bonds for $317,350. It was a cash subscription and the interest-bearing bonds are to be regarded as equivalent to a cash payment, and if the railroad company declined to accept them in discharge of the subscription, it was the duty of the court to raise the money by taxation. The tribunal had no right, either by reason of its jurisdiction over the subject-matter, or by the letter or spirit of section 19 of the railroad charter, to insure bonds for an unlimited amount and then place upon the market at a discount, in order to satisfy the debt to the railroad company. *The power to issue the bonds does not imply the power to sell.* No general power is conferred upon county courts to issue such bonds or to subscribe stock in behalf of the county in which the tribunal exists, to railroad companies or other corporations, &c." And further: "In this case the voter agreed to the taxes in the sum of $250,000, the debt to be discharged by a direct tax, or by the issuing of bonds for that amount; and to say that because he voted to pay that amount he is liable to pay the additional sum of $67,350 is not warranted by the letter or spirit of the law conferring the power in the county court to tax him, or consonant with natural justice. If the legislature had been asked to vest in the county court of Daviess the power to raise by taxation the sum of $317,350, the whole sum bearing interest to pay this debt of $250,000, would such a proposition have received serious consideration? Or if such authority had been expressly given, is it to be presumed that the tax-payer would have been so regardless of his own interest as to cast his vote in favor of the measure?" And at page 109: "The county court in fact never authorized the issuing of bonds to a greater amount than $250,000, and if that tribunal had the right to exceed the power conferred upon it, still it has not attempted to exercise this right except by a levy of the tax upon the citizen to pay the interest. It is maintained by the county court that because it has once levied the tax, or continued to do so, since the bonds were issued to pay the interest, that this amounts to a ratification of the action of the county court by the taxpayers of the county.

"That the county court obtained all the power that could be properly exercised with reference to this question of taxation from the 19th section of the act, incorporating the railroad company, is too plain for controversy. The county court, in issuing the bonds in excess of the $250,000, or permitting it to be done by the committee appointed by the court, transcended the authority given by the legislature, and no subsequent act of the county court or of the taxpayers can make valid the exercise of a power that had had no legal sanction.

"The corporation knew the extent of the power given the county court by the act incorporating the company.

"The voters of the county had no right to assume the burdens except in the manner provided by the act. They could not ratify an act that neither the county court nor themselves had the power to perform. If the principal could not exercise the right, it is difficult to perceive how his sanctioning its exercise by an agent could make it legal. In making the over-issue the county court or its committee acted beyond the scope of its agency, and outside of the power given by the legislature. The only way in which the people could ratify it would be by a vote under a legislative enactment."

We have quoted from this opinion at length because it is the decision of the supreme court of a sovereign State construing one of its legislative acts which grants the high governmental power of levying taxes which involves the taking of the citizen's property. This decision was made before the plaintiff sued in this court on his bonds, and before this court had occasion to construe the statute. It is the rule established by the State court upon this subject and in perfect harmony with its other decisions on kindred subjects. (C. & L. R. R.

Co. *vs.* Kenton County Court, 12 B. Mon., 128; Bosley *vs.* Mattingly, 14 *ibid.*, 72.)

The decision is not placed upon the grounds that these were mere defects or irregularities in the performance of the conditions precedent or in the manner of the execution of a vested power, such defects might be cured by mere recitals where they lie peculiarly in the knowledge of the makers of the bonds; but the decision is put upon the plain ground that there was absolutely no power in the county court to make the bonds, and, in fact, that it did not claim such power, and that the county court, not having such power itself, did not, and could not, confer such power upon the committee. It decides that the act of the committee was outside of the scope of its authority, was a nullity, and not binding upon the county. This decision is well considered and is supported by an abundance of authority. (Marsh *vs.* Fulton County, 10 Wallace, 676; Aspinwall *vs.* Daviess County, 22 Howard, 378; 1 Dillon on Municipal Corporations, sections 426–55; U. S. *vs.* County of Macon, 99 U. S., 591; Floyd's Acceptance, 7 Wallace, 666; Anthony *vs.* Jasper County, 101 U. S., 693.)

Where the enabling act requires that certain precedent conditions shall be performed before the officers issued the bonds, until such conditions are performed, the officers have no power to act, the right does not arise, nor can such power ever be deduced by implication from other powers; there must be affirmative legislation to authorize the issue of municipal bonds. (Board of Commissioners *vs.* McClintock, 51 Ind. 325; Borroughs on Pub. Securities, 256–60.)

When an election is required before issue, and a majority is required to vote in favor of the proposition, such a vote is essential to give the officers jurisdiction to act at all. (Lewis *vs.* Commissioners of Bourbon County, 12 Kuno, 186; Gulf R. R. Co. *vs.* Commissioner of Miami Co., 122 *ibid.*, 234.) In Commissioners *vs.* Thayer, 94. U. S., 641, Mr. Justice Hunt says: "Upon this point all the decisions of this court, and so far as we know, of all other courts, concur. If a majority of the electors cast their votes against the proposition to issue bonds the entire foundation of the proceedings is gone. There is an absolute want of jurisdiction to proceed further in the matter, and an attempt to do so is void, as are all proceedings or issues based upon it." So when the vote was taken before the enabling act went into effect, the bonds were held as void for lack of authority to issue them, although the requisite majority favored the issue. The electors at the time had no power to consent. (People *vs.* Alfred Burk, 13 Wis., 432; Berliner *vs.* Town of Waterloo, 14 Wis., 378.)

Where the enabling act provides that the county court may call a vote to be taken to ascertain the will of the tax-payers for information, it is held that *may* when applied to public officers means *shall*, and a *mandamus* to compel the issue of the bonds was refused because no election had been held and no power existed to issue the bonds without an election. (Leavenworth and Des Moines R. R. Co. *vs.* County of Platte, 42 Mo., 171.)

Unless the vote is taken upon the proposition *named* in the notice, no power to issue bonds is thereby conferred. (Parkham *vs.* Jefferson County, 2 Col., 338.) If the vote has not been taken as required no issue will be compelled, and if issued no tax will be levied to pay the bonds. (78 Ill., 603; 79 Ill., 3723; 57 Ill., 20; 65 Ill., 290.) These cases show that there must be an enabling act in force, that the votes must be taken pursuant to said act, and upon the proposition stated in the notice, and the requisite majority must favor the proposition or no power is conferred to make the bonds, or, if they have been made, to collect tax to pay them.

The town of Elmwood was authorized to subscribe for stock in a railroad upon a favorable vote, and to issue bonds to the amount of $35,000. Notice was given of an election to be held under the charter; a few days later additional notice was given to subscribe and issue bonds for $40,000 additional. The last notice did not purport to be pursuant to the charter, but before the election the charter was amended so as to allow the additional subscription ; the vote resulted in favor of both subscriptions, and bonds were issued, the legislature having passed an act declaring the election as to the additional $40,000 legal and valid. The State courts held the $40,000 of bonds void. (Marshall *vs.* Sillman, 61 Ill., 281 ; Wiley *vs.* Sillman, 61 Ill., 170.) The question then came before the Supreme Court of the United States, and it, regarding the decisions of the State courts construing the State statutes as binding upon it, followed the rulings of the supreme court of Illinois, and held the $40,000 of bonds void. (Township of Elmwood *vs.* Marey, 92 U. S., 289.)

There is a broad difference between private corporations and public or municipal corporations, in reference to the doctrine of *ultra vires,* or want of power. In cases of private corporations, or corporations not municipal, the tendency of the courts is to restrain the doctrine of *ultra vires* to clear cases of excess of power within the knowledge of the other party, expressed or implied from the nature of the corporation, and of the contract entered into.

In its application to municipal corporations the rule is more rigid. (Borroughs on Pub. Securities, 366.)

Speaking on this subject, Mr. Justice Hunt said :

"We have held that there can be no *bona-fide* holding where the statute did not in law authorize the issue of the bonds. The objection in such cases goes to the point of power. There is an entire want of jurisdiction over the subject. It is not a case of an informality, an irregularity, fraud or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there is no such thing as a *bona-fide* holding." (Township of East Oakland *vs.* Skinner, 94 U. S., 259.)

A want of authority may arise from various causes ; where the purpose for which the bonds are issued is private and not public ; where the enabling act violates some provision of the constitution ; where the power exercised is different from that delegated; when the enabling act requires the performance of conditions precedent, without which performance the power to make the bonds does not vest; or, where there is an exercise of power not conferred by any enabling act; or, in excess of the power conferred by the enabling act. In all such cases there can be no *bona-fide holding*; nor does the principle of equitable estoppel, based upon the doctrine of municipal decision, apply; nor can there be a levy of taxes to pay bonds so issued.

As examples of void bonds, because the purpose was private as distinguished from public, we cite Allen *vs.* Inhabitants of Jay Co., 60 Me., 124; Curtis *vs.* Whipple, 24 Wis., 350–5; Lowell *vs.* Burton, 111 Mass., 454; Loan Association *vs.* Topeka, 20 Wallace, 655.

In the case last cited the court ruled that the payment of interest did not work an estoppel. The legislature was without power to authorize the issue of the bonds for such a purpose, and the payment of interest, which was equally without authority, could not create the power.

As examples of void bonds, because of a repugnance in the enabling act to some constitutional provision, or because the exercise of the powers embraced in the enabling act will work a result which the constitution has guarded against, we cite Town of South Ottawa *vs.* Perkins, 94 U. S., 260. In this case the journals of the legislature did not show that the vote had been taken on the passage of the act as required by the constitution, but the act was published in due form, the vote regularly taken under it, and the bonds issued.

The bonds contained a recital that they were issued "in pursuance of an election in said town on the 8th day of October, held under and by virtue of an act of the legislature of Illinois, approved February 19, 1857." The Supreme Court of the State has construed such statutes and the Supreme Court of the United States followed the decisions of the State court, and held these bonds void in the hands of a *bona-fide* holder. It was claimed that notwithstanding the fact the act had never become a law, yet as the purchaser had in good faith parted with his money without notice of any objection to the validity of the bonds, the town had paid the first installment of interest, and the act had been duly published among the printed statutes, and being thus *prima facie* a law, then circumstances ought to estop the town from denying the passage of the act. The court holds the doctrine of estoppel did not apply. Mr. Justice Bradley said: "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party—a law to-day and not a law to-morrow; a law in one place and not a law in another in the same State. And whether it be a law or not a law, is a judicial question, to be settled and determined by the courts and judges. *The doctrine of estoppel is totally inadmissible in the case.*"

It will be seen that the foregoing establishes the true rule; for the authority of the legislature to pass laws is derived from the people, whose will is declared in their fundamental law. A law, to be valid, must follow the provisions of the constitution strictly. Mr. Cooly, speaking on this subject, says: "It also seems to us that there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority and which ought, therefore, to be scrupulously observed and obeyed." (Cooly on Const. Lim., 150, 151.)

The rule applies to the case at bar. All the power with which the county court was clothed to act in the matter of said subscription was derived from the enabling act, which must be strictly construed; no presumptions run in such cases, but the power conferred by such acts being a naked power, the court will construe it strictly.

There are many other instances of void bonds, but the foregoing is sufficient to demonstrate the settled rule, which is well expounded by Mr. Borroughs. "The importance of these limitations to the holders of municipal bonds is apparent to the most casual observer. All such bonds derive their validity from enabling acts; municipalities have no inherent power to issue such securities. Unless the acts which authorize their issue are valid, the bonds are worthless. The *bona fides* of the holders of such bonds cannot avail them, for there is a want of power to issue, and where this defect exists, it is fatal to the holder, nor does the doctrine of estoppel aid them, or the recitals in the bonds that they are valid; the enabling acts being void, the bonds are nullities." (Borroughs on Pub. Securities, 426.)

In Harshman *vs.* Bates County, 92 U. S., 569, 575, it was held that bonds were void issues under act authorizing subscription upon a two-third vote of the qualified *voters who vote at such elections*, because the constitutional limitation was that no such authority should be given unless two-thirds of the voters of said *counties, &c., shall consent* thereto. And where the bonds have been given into the hands of innocent purchasers, which were issued under an enabling act requiring a majority vote, when the constitutional limitations required a two-third vote, the court has held them void, and that the act of itself conferred no authority to issue bonds, nor was any conferred after the vote was taken, although the vote showed that more than two-thirds had voted in favor of the proposition; no recital could cure this defect which amounted to a want of power, nor did it avail that the holder purchased for value and without notice. (Jarrold *vs.* Mobberly, 103 U. S., 180; Allan *vs.* Louisiana, 103 U. S., 80.)

The doctrine applies in cases of constitutional inhibitions adopted after the enabling act had been granted, when the power granted had not been exercised; or, when granted on conditions which had not been performed, the inhibition takes effect at once and cuts off the power, and bonds issued thereafter are void. (Aspinwall *vs.* Daviess County, 22 How., 364; Town of Concord *vs.* Portsmouth Savings Bank, 92 U. S., 625.)

Where the constitutional limitation of the levying of taxation had been exceeded in the issual of municipal bonds, the court, in an action to enjoin the levy, declared it void and said, "municipal corporations have no power except what proceeds from positive enactment; this applies not only to the means of exercising power, but to the power itself."

There is no distinction in reason in the cases of entire absence of enactment conferring power and a prohibition of its exercise. In the first case power is not granted, and is not, therefore, possessed; in the other, it is expressly withheld and its exercise prohibited, and therefore not conferred. (McPherson *vs.* Foster Bros., 43 Iowa, 41.)

Buchanan *vs.* Litchfield, 102 U. S., 287, was a suit by a *bona-fide* holder on coupons of bonds issued by the city of Litchfield, under an act authorizing cities, &c., to erect water-works, and for that purpose to appropriate and borrow money and to levy taxes. The Constitution limited cities, &c., in incurring indebtedness to an amount including the existing indebtedness, not to exceed five per centum on the value of the property. Before the bonds were issued the city's indebtedness had reached the limit. Each bond recited that it "is issued under authority of an act of the General Assembly of the State of Illinois, and entitled 'An act to authorize cities,' &c., to construct and maintain water-works, approved April 15, 1873, and in pursuance of an ordinance of said city of Litchfield, No. 184, and entitled 'An ordinance to provide for the issuing of bonds for the construction of the Litchfield water-works,' approved December 4, 1873."

The plaintiff relied upon the recital and the fact that he was a *bona fide* holder, which was admitted; he also urged that the city of Litchfield had been supplied with water with the money of those who held the bonds, and that the defense was fraudulent and dishonest. It also appeared that the fact whether the city's indebtedness exceeded the limitation was a fact peculiarly in the knowledge of the city, and that the public had no convenient means of ascertaining the fact. The bonds were held void. Mr. Justice Harlan said: "If, therefore, it appears, by evidence, of which the city may rightfully avail itself, as against a *bona-fide* holder for value of the coupons in suit, that the bonds, issued January 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the Constitution, there would seem to be no escape from the conclusion that the bonds are void, for the want of legal authority to issue them, at the time they were issued. * * * But in what way was the purchaser to ascertain the extent of the city's indebtedness, existing at the time the bonds were issued? The extent of that indebtedness was peculiarly within the knowledge of the constituted authorities of the city. It was necessarily left, both by the constitution and the statute of 1873, to their examination and determination, under the constitutional injunction, however, *that no municipal corporation should exceed the perscribed amount of indebtedness*. It was nevertheless a fact which, so far as we are advised by the record, could not at all times and absolutely, or with reasonable certainty, be ascertained from any official documents to which the public had access." And after deciding the bonds void the court said: "Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds further than would be consistent with reason and sound policy, and further than we are willing to go. The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, was, in itself, conclusive proof in favor of a *bona-fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold.'' And, in speaking of the defense as characterized, the court said: "Waiving all considerations of the case, in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.''

In this case the court referred to and discussed the following cases and declared that the rule named in them did not apply to such a case. (Town of Coloma *vs.* Eaves, 92 U. S., 484; Orleans *vs.* Pratt, 99 *ibid.*, 476; Commissioners of Knox County *vs.* Aspinwall, 21 How., 599; Kennicott *vs.* Supervisors, 16 Wall., 452; Moultrie *vs.* Savings Bank, 92 U. S., 631; Mareny *vs.* Township of Oswego, *id.*, 637.) While the doctrine asserted in these cases does not apply to the case at bar as it did not apply to the Litchfield case, yet the doctrine has been seriously doubted, and the tendency of the recent decisions is to abrogate it, and to adopt the sound doctrine expressed in the dissenting opinion of Mr. Justice Miller, concurred in by Justices Davis and Fields, in Humboldt Township *vs.* Long, 92 U. S., 642. (See Borroughs on Pub. Securities, 336–46.)

If it be true under our system of government that municipal corporations have no inherent power to subscribe, issue bonds and levy taxes in aid of railroads, that said power must come by express grant from the legislature, that the legislature cannot grant such power unless permitted to do so by the fundamental law, and that when the Constitution permits, the legislature has power to prescribe conditions precedent without the performance of which the power shall not vest; then how can this power come from any other source? The Constitution says a bond shall not be made, an officer makes the bond and recites that it is made pursuant to the Constitution, the bond is valid! The legislature expressly provides that the dormant powers in the enabling act shall not vest until a condition precedent has been performed, the condition is not performed, but the officer recites falsely that it has been performed, and this recital vests the power! The legislature grants an enabling act, to take effect upon the performance of conditions precedent, to issue bonds and levy taxes to the amount named by the tax-payers at an election, the tax-payers name a fixed amount, the officer issues bonds in excess of the amount; this enlarges the power granted by the legislature! What is to be the future of a government under whose law the mere false recitals of public officers control and govern the fundamental and statute law of the land? When the courts of justice impose such injustices upon a sovereign people, the question may well engage the attention of every thoughtful man who claims protection under that safeguard which says that the citizen shall not be deprived of his property without *due process of law*.

We have said that the tendency of the recent decisions is to depart from the doctrine of equitable estoppel as stated in the earlier cases; for the purpose of verifying this statement we quote the latest decisions of the Supreme Court on this subject. In Anthony *vs.* County of Jasper, 101 U. S., 697, Chief Justice Waite said: "Dealers in municipal bonds are chargeable with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona-fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no liability can be created. * * * The question is one of authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against the rule than any other."

Wells *vs.* Supervisors, 102 U. S., 625, is a case where bonds were issued in payment of subscription to a railroad under an act, and favorable vote, and there was no constitutional limitations except the general limitations which prevented a subscription without an enabling act. The bonds recited that they are "issued under and pursuant to an order of the board of police of said county of Pontotoc, now known as the board of supervisors of said county, made under the authority of the constitution and laws of said State of Mississippi, authorized by a vote of the people of said county at a special election held for the purpose on the 20th day of November, A. D. 1869." Bonds were issued to the amount of $150,000, the amount of the subscription voted under the enabling act. The board of police were authorized to assess and collect tax "*for the payment of the capital stock so subscribed.*" The act also provided that when any person should hold certificates of taxes paid equal to a share of the capital stock, upon presentation of the same to the company it should take them up and issue to him stock to the amount of taxes so paid. Those bonds were held absolutely void for want of legal authority to make them.

The case last cited was immediately followed by Ogden *vs.* County of Daviess, 101 U. S., 634, when the act authorized the inhabitants for a limited distance on each side of the road to subscribe, and the county court to levy a tax to pay the subscription. The county issued its bonds in payment of the subscription voted. These bonds were held void in the hands of a *bona-fide* holder.

In The County of Green *vs.* Damill, 102 U. S., 187, the objection to the bonds was that they were not issued in the denomination stated in the proposition submitted to the vote. The court held that the commissioners might change the denomination *provided that the total amount of bonds issued should not exceed the amount stated in the proposition accepted by the vote of the qualified electors of the town.* There is an express decision against the over-issue of bonds.

A city in Missouri, having lawful power to borrow money and provide for the payment of her debts, issued her bonds for the purpose of raising means to pay her interest-bearing debt and the expenses of her government; they recite that they are "issued under the authority of her charter, and an ordinance pursuant thereto, passed January 8, 1867, although not actually executed until July 16, 1872, they were antedated as of January 1, 1872, for the purpose of evading a law of the State passed March 28, 1872, which required such bonds to be registered. These bonds went into the hands of an innocent purchaser who believed them to be what they purported on their face to be, and paid value for them. It was held that the bonds were void because antedated and not registered, although in the hands of a *bona-fide* purchaser, and that no recovery could be had on them." (Louisiana *vs.* Wood, 102 U. S., 294.)

That all parties should be required to take notice of the laws which clothe public officers with power, is a corollary which necessarily follows from our system of government. The Federal or State government, or any sub-governmental agencies, being abstract entities, must make their contracts through the intervention of agents, and their evidences of debt must be executed and signed by such agents. There is a wide distinction between such public agents and private agents. The term agent, in its general sense, does not properly express the functions of public agents. It is more proper to speak of them as officers, as a part of the machinery of the government. The functions of the government are performed through its officers whose powers are derived from the people and are defined and limited by the fundamental and statute laws of the country. If these public agents or officers exceed the power vested in them by the law, their acts are *ultra vires* and void, while in the case of private agencies the principal is often bound when the agent exceeds his authority. In this country all power resides in the people. They have by their Constitution delegated to the legislature a portion of their sovereign power, and all who deal with the agents of the government are required to look to the Constitution and to the acts of the legislature to ascertain the power of such agents. When their acts are within the scope of the powers vested in them by the public law, of which all men must take notice, they bind their principal: when beyond their scope, they do not. All the powers of a public agent are defined and fixed by public law, ignorance of which no man may profess, nor will any court presume it in his favor. (Floyd's Acceptances, 7 Wall., 576; McPherson *vs.* Foster Bros., 43 Iowa, 65; State *vs.* Hayes, 52 Mo., 578; Major *vs.* Reynolds, 23 Md., 10; Price *vs.* U. S., 1 Nott & N., 270; Borroughs on Pub. Securities, 210; Anthony *vs.* Jasper County, 101 U. S., 783.)

The following cases will illustrate the rule still further. Under an enabling act a vote was taken on a proposition to subscribe to L., C. & G. R. R. Co., which resulted favorably. Before the bonds were issued this road was consolidated with another. The name of the new company was the L., L. & G. R. R. Co., and to this new company the bonds were issued, the subscription having been made after the consolidation. The bonds recited: "This bond is issued by virtue of an act of the State of Missouri, approved March 23, 1868, entitled an act to facilitate the construction of railroads in the State of Missouri, and authorized by a vote of the people, taken May 3, 1870, as required by law, upon the proposition to subscribe $90,000 to the capital stock of the L., C. & G. R. R. Co., and which said railroad company last aforesaid, and the former P. & H. division of L., C. & G. R. R. Co., were, on the 4th day of October, 1870, consolidated, as required by law, into one company, under the name of the L., L. & G. R. R. Co." The bonds were dated January 8, 1871, and payable to the last-named company or bearer. The court held them void in the hands of a *bona fide* holder, because there was no power to make them. The vote was taken for another purpose and at a time when the last-named company had no existence. (Harshman *vs.* Bates County, 92 U. S., 469.)

An enabling act authorizes a town to issue bonds in aid of a bridge. The act was to take effect from and after its publication in a certain newspaper. It was published March 21, 1872. A condition precedent was that a majority of the voters should vote in favor of the proposition at an election, of which thirty days' notice should be given in three public places.

The bonds were issued April 15, 1872, and contained a recital that they were issued in pursuance of an act entitled "An act authorizing the trustee, treasurer and clerk, or any two of them, of the township of Oxford, in the county of Sumner, State of Kansas, to subscribe for stock in the construction of a bridge across the Arkansas river at Oxford, in said county and State, and to issue the bonds of said township in payment thereof, approved March 1, 1872," and in pursuance of a vote of the qualified electors of said township, had at an election held therein, on the 8th day of April, 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total vote of 140.

The enabling act did not take effect until its publication in the newspaper named on March 21, 1872. The election was held on the 8th of April, 1872. A period of only eighteen days elapsed between the time the law took effect and the election, and the law required a notice of thirty days. The court decided that the bonds were not valid, because of the failure to give the thirty days' notice, and that the purchaser of the bonds had notice of this defect. The recital informed him of the day of election and directed him to the law under which the bonds were issued, which in express terms announced to him that it did not take effect until published in a particular newspaper; and being thus put upon inquiry, it was his duty to ascertain when the law was published and did go into effect, and he will be chargeable with such information as by reasonable diligence he could have ascertained.

Chief-Justice Waite remarked: "To be a *bona fide* holder one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. *Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements.*" (McClure *vs.* Township of Oxford, 94 U. S., 429.)

A town was authorized to issue its bonds in aid of a railroad, under the usual conditions, and to borrow money *by disposing of the bonds at not less than par*, and invest the money so raised in stock of the railroad. The commissioners, instead of selling the bonds, exchanged them for stock in the road, and the bonds recited that they were given for value received in stock of the railroad company. The court held the bonds void for want of power to exchange them for stock, and that the holder was not a *bona-fide* purchaser, because the bonds recited a violation of the enabling act of which he was chargeable with notice. (Horton *vs* Town of Thompson, 71 V. & P., 513.) And in Scipio *vs*. Wright, 101 U. S., 675, the Supreme Court followed this rule on this point as the decision of a State court upon its statutory law binding upon it.

Where bonds recited that they were issued in payment of its subscription, and in pursuance of a vote at an election held on that subject, and in point of fact there was no law authorizing the subscription or election, the holder was held chargeable with notice of the illegality of the issue. (Barnes *vs*. Town of Lacon, 94 Ill., 461.)

II. It is insisted that the county has ratified the overissue of bonds by paying a part of the principal, and for six years the interest on the remainder. We have already seen that the only way in which the county could ratify these excessive bonds is by procuring an act for the purpose and again casting a majority vote. (W. & Mt. S. T. P. R. R. Co. *vs.* Clark Co. Ct., 3 Metcalf, 141; Shelby Co. Ct. *vs.* C. & O. R. R. Co., 8 Bush., 216; Daviess Co. Ct. *vs.* Howard, 13 Bush., 101.) In this case no such steps have been taken.

The payment of interest on the bonds does not amount to a notification. (Daviess Co. Ct. *vs.* Howard, *supra;* Loan Association *vs.* Topeka, 20 Wallace, 655; Ryan *vs.* Lynch, 68 Ill., 160.) In the case last cited, as late as 1873, the tax-payers procured an injunction restraining the collection of taxes to pay interest on bonds issued in 1857; and on appeal the injunction was sustained. We take this doctrine to be so well settled that further citations are unnecessary. Indeed, it seems to us that the reason of the rule is too sound to be controverted, the principle being that the bonds were the result of a wrongful act which was not authorized, that the assessment and collection of taxes to pay on such bonds was equally wrongful and unauthorized. That the exercise of the last wrongful act would make the first act right, that one wrong alone is still wrong, but two wrongs make a right, two void acts make a valid act? That two negatives make a positive is too algebraical for the courts.

III. Before discussing the doctrine of estoppel relied on by counsel for defendant in error, we desire to reply to the unwarranted characterization of the defense. Learned counsel treat it as unjust, unfair, unconscionable, in bad faith and without principle. Lawyers' views on such subjects largely depend on whose ox is gored. It will be seen from the record that the same judge, who without authority issued these bonds, attempted to foist them on the unwilling tax-payers, and vigorously resisted their honest effort to resist payment of them on the plain and just grounds that under their constitution and the act of 1867 they had the legal right to say what debt they would incur and to fix the amount of it, and that in the exercise of their plain, legal right, they had fixed the amount of the debt which they were willing to assume, and that the unjust and unauthorized burden of the excess could not in law, and ought not in equity, be imposed upon them without their consent and over a constitutional inhibition. It is true, they paid taxes for some time; but it is also true that they had no actual notice of the overissue of bonds during such payment, and sought their remedy as soon as they had actual notice. They do not stand in the light of repudiators, but say to this honorable Court that they ask no relief against the burdens they assumed, but only against that which they did not assume, and which, under the law, they had no power to assume except by an enabling act to ratify the illegal and unauthorized debt sought to be imposed upon them by an officer, all of whose powers were defined by public law, of which the bond speculators were bound in all justice to have taken notice. Of his own volition and negligence he purchased the bonds without making the examination, when put upon notice, which the law required him to make, and which, if made, would have saved him unhurt; he then poses before the court as an object of equitable charity and asks the court to save him from loss by transferring the loss to, and imposing a burden upon, the unwilling taxpayer against his consent. If the taxpayer complains and pleads for his constitutional and legal rights, he is to be characterized before the courts of his country as of bad conscience, bad faith, and without just principle. And this, too, when on the very same doctrines and principles insisted upon by counsel on the other side, he might, with the same reason, justice, and authority of law, have imposed upon him a debt without limit, the burden of which might reach his posterity to the fifth generation, because if the power to issue the bonds was without limit, then it was infinite and without bounds, and might as well have been five million as five thousand.

It is insisted that the recital on the back of the bonds operates as an estoppel on the county to show its defense. We think this ground not well taken and not supported by authority. It will be observed that the indorsement is not in the body of the bond and is no part of it, and was made without authority; that the county court referred to in the act of 1867 was the county court composed of the judge and justices and not the judge alone; that sitting alone as a county court he had no authority to issue the bonds or do any other act connected with the subject; that he had only such powers in the matter as were conferred upon him by order of the county court of June 13, 1868, (Record, p. 22,) when the justices were sitting; that said order directed that "said bonds shall be signed by the presiding judge of Daviess county, *and the clerk of the county court of Daviess county, and have the seal of the county impressed on each,*" and that the certificate was not signed by the clerk of the county court, nor did it have the seal of the county impressed on it, and it was not, therefore, executed by the county court and is not binding upon it.

It is proper here to examine the meaning of "county court" as used in the laws of Kentucky, and their legal attributes. The same term "county court" is used whether referring to the court as composed of the judge alone, or the judge in conjunction with the justices, and to determine which is meant reference must be had to the nature of the business to be done by the court. This question is fully elaborated and explained in the case of Bowling Green and Mechanicsville Railroad Company *vs.* Warren County Court, 10 Bush., 711, which is a full and complete reply to the case of Cook, &c., *vs.* Logan County, quoted in full in brief of General Speed for defendant in error, and shows that the rule laid down in that case does not apply to the case at bar. The act referred to in the Bowling Green case, *supra*, was passed March 22, 1871, and before the statute of 1873, so that the court of appeals were construing the meaning of "county court" under the same statutory enactments as in the Cook case.

In the Bowling Green case, 10 Bush., at page 718, the court says: "If the direction of the legislature had been imperative on the county court to enter the order submitting the question of subscription to the people, there would be little difficulty in determining this question; for if the county court had been deprived of all discretion and compelled to obey the mandatory act, it would be immaterial whether the county court composed of the justices or the county judge made the order, as either or both must obey." In this case the only question before the court was the question of what kind of a court was meant in the following provision of the enabling act: "That whenever the said railroad company shall request the county court of any county through or adjacent to which it is proposed to construct said railroad to subscribe, either absolutely or on specified conditions, a specific amount to the capital stock of said company, the county court so requested *may in their discretion order an election* to be held at the several voting places in said county," &c.

Let us compare this provision with the provision in the Cook case, relied on for defendant in error. It provides, section 2 (page 8, Mr. Speed's brief), "that whenever the said Elizabethtown and Paducah Railroad Company shall request the county court of any county through or adjacent to which it is proposed to construct said road to subscribe, either absolutely or on specified conditions, a specified amount to the capital stock of said company, the county court so requested *shall forthwith order an election* to be held," &c. And section 7 provides that when any county, &c., which may have so subscribed, "*it shall be the duty of the county court, &c.*, to issue the bonds of said county," and section 9 provides that when any court shall have so subscribed and issue its bonds, "*it shall be the duty* of the county court of such county, &c., to cause to be levied and collected a tax sufficient to pay," &c.

Now, it will be clearly seen that in the first act the powers conferred were not ministerial nor mandatory, but were legislative. The legislature delegated to the county court the preliminary consideration of the expediency of submitting to a vote the proposition, and the justices being the immediate representatives of the people, were held to be included in the meaning of "county court" as used in the act. But in the last case the acts were purely ministerial and were mandatory, and so held to be by the court. So it was immaterial to the people whether the judge or the justices obeyed. No preliminary consideration was allowed, nor was there left any ground for the exercise of discretion or legislative functions.

Now, it only remains to see to which of these acts the 19th section of the act of 1867 is similar, and we will have no difficulty in applying the rule. If the powers conferred were purely ministerial and mandatory, then we have the rule laid down in the Cooke case; while, on the other hand, if the powers were legislative and left room for the exercise of a discretion on the part of the court, we must apply the rule in the Bowling Green case.

The 19th section of the act of 1867 provides "that the county courts, &c., *shall have power, and are hereby authorized, to subscribe to the capital stock* such number of shares as may be determined by said county courts respectively, and to levy upon the tax-payers of such counties respectively such taxes as may be necessary to pay the stock so by them respectively subscribed; *and said county courts may, if they shall deem it prudent,* issue the bonds of said counties respectively for the amount of stock subscribed or any part thereof."

That these powers were not ministerial *or* mandatory, but legislative and discretionary, is too plain to admit of argument, and had the county court refused to submit the question to a vote no *mandamus* could have compelled it to do so, nor could it have been compelled to subscribe the stock after the vote, for the provision is, "said stock shall not be subscribed unless a majority of all the votes cast at said election shall be in favor of such proposition." Neither could the court have been compelled to issue the bonds, for in its discretion it might have raised the money by direct levies.

Having now shown what the "county court" referred to in the act meant the court composed of the judge and the justices, we have the clear legal proposition that the county court was clothed with no power in the matter, except that derived from the enabling act as made active by the vote, and that the committee or county judge in executing the bonds had no power except that contained in the order of the county court. The order provided that the bonds to the amount of $250,000 should be issued, signed by the county judge and county clerk, and have the seal of the county impressed on each; this was all that was authorized and all that could be done. County courts can only act under the law through their orders made of record. (W. & Mt. S. T. P. R. R. Co. *vs.* Clark Co. Ct., 3 Metcalf, 141; Fletcher *vs.* Leight, 4 Bush., 307.) They are courts of limited jurisdiction and derive all their powers from express legislative enactment. (Martin *vs.* McKenny, Sneed, 321; Gilbert *vs.* Bartlett, 9 Bush., 53.) A subscription on the part of a county is not binding unless the orders of the county court made of record when a majority of the justices were present, amount, of and within themselves, disconnected from any act done out of court by any one, or in court not of record, to a perfect and complete subscription of stock. (Mercer Co. Ct. *vs* Ky. River Nav. Co., 8 Bush., 307.) This rule applies to the indorsement on the bonds and to the excessive issue.

The revised statutes of Kentucky provided, prior to act of 1873, that "county courts should have power to erect, superintend and repair all necessary public county buildings and structures." The county judge made an order and contract for the erection of a jailer's residence, which is held to be a necessary public county building, and it was erected accordingly; the claim for it was presented to the county court, composed of the justices; they refused to allow the claim because the county judge was not the county court, in the meaning of the statute, and have no power to contract the debt. On appeal the court sustained the justices, and held that neither the county nor the county court, as its representatives, were bound. (Harrison Co. Ct. *vs.* Smith's adm'rs, 15 B. Mon., 156.)

It seems to us from the foregoing principles that the county judge had not the authority to make the indorsement on the bonds, and that it is not binding on the county; because, if he could not bind the county by order of record, how could he do so by a mere unauthorized statement, which is no part of the bond and not executed as a part of the bond?

Instead of the recital in the certificate estopping the county it put the defendant in error on notice, and being put on notice he is chargeable with what he might have discovered by due diligence. In McClure *vs.* Township of Oxford, 99 U. S., 429, in a case fully as strong against the municipality as the case at bar, this Court said through its Chief Justice: "Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the statute under which they were issued, *is bound to take notice of the statute and all its requirements*." It is insisted by learned counsel that if no vote had been taken at all the bonds would have been binding. To this view we dissent. Where the enabling act prescribes conditions precedent to be performed before the power in the act shall vest, there is no power to act until the conditions have been performed. When an election is required before issue, and a majority is required to vote in favor of the proposition, such a vote is essential to give the officers jurisdiction to act at all. (Board of Commissioners *vs.* McClintock, 51 Ind., 325; Borroughs on Pub. Securities, 256–60; Lewis *vs.* Commissioners of Bourbon County, 12 Kuno, 186; Commissioners *vs.* Thayer, 94 U. S., 641.) In the case last cited Mr. Justice Hunt says: "Upon this point all the decisions of this Court, and, so far as we know, all other courts, concur."

We think the weight of authority will show that the recital, even if authorized, does not amount to an estoppel. The case is not one where the act constituted a tribunal to determine when the conditions precedent had been complied with and they have acted, nor is it a case of mere irregularities, or an abuse of vested powers; but it is a case where there is an absolute absence of power, which no recital can cure, and there can be no *bona-fide* holder of bonds so issued.

IV. We think the decision of the State court in the case of Daviess County *vs*. Howard, *supra*, is a decision of the highest judicial tribunal of the State construing its Constitution and statutes and the rights of its citizens under them on the sovereign question of taxation, and that this Court will follow that ruling.

It is a well-established rule of law, growing out of courtesy and necessity, that, where there are for the same people courts of concurrent jurisdiction, the court which first gets possession of a subject has the exclusive right to decide it; and any other court of concurrent jurisdiction which may thereafter get possession of the same subject is bound to follow the decision already rendered. (Riggs *vs*. Johnson County, 6 Wallace, 177.) Surely it will be an intolerable state of affairs if there is to be one law for a citizen of Kentucky and another totally different law for a citizen of Tennessee, to be administered by courts of concurrent jurisdiction sitting in the State of Kentucky. A municipal bond is a valid and binding obligation or it is absolutely void, and this is to be determined, not by that law which metes out equal justice to all men, but by the fact of residence or non-residence in a particular State of the party who happens to hold it! If the holder of such bond resides in the State of Kentucky he must sue in its courts; the municipal officers have no power to levy a tax to pay his bond, and will be punished for contempt of court if they attempt to do so; but if the holder resides in the State of Tennessee, then that fact alone clothes such officers with power to levy the tax, and not only so, but forces them into contempt of their State courts!

A sovereign State cannot long exist, nor can its citizens be freemen, under such administration of justice. All the power of the Federal government is delegated to it by the States, and no State has ever surrendered her sovereign power to such an extent that she could not, by her own judiciary, construe her own statutes, prescribe, regulate and limit her own taxation, and secure to her own citizens the same rights within her borders that any citizen of a sister State may acquire therein.

No such state of affairs was ever contemplated by the framers of our complex system of government, sovereignties within a sovereign; and for the express purpose of avoiding it, the judiciary act of 1789, organizing the courts of the United States, provides, "That the law of the several States, except where the Constitution or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trial at common law in the courts of the United States, in cases where they apply." (Rev. Stat. of U. S., p. 136, chap. XII, sec. 720.)

In Gilpeke *vs.* Dubuque, 1 Wallace, 210, Mr. Justice Miller said: "The general principle is not controverted, that to the highest courts of the State belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction is given by the State court that this court is bound to follow it. The cases on this subject are numerous and the principle is as well settled and is as necessary to the harmonious working of our complex system of government as the correlative proposition that to this Court belongs the right to expound conclusively for all other courts the Constitution and laws of the Federal Government."

In Douglas *vs.* County of Pike, the court says: "The judicial construction is as much a part of the statute as the text itself, and this court will follow such construction." (11 Otto, 677.)

In Supervisors *vs.* United States, 18 Wallace, 71, Mr. Justice Strong says: "That the construction of the statutes of a State by its highest courts is to be regarded as determining their meaning, and generally as binding upon the United States courts, cannot be questioned. It has been asserted by us too often to admit of further debate. We have even held that when the construction of a State law has been settled by a series of decisions of the highest State court, differently from that given to the statute by an earlier decision of this court, the construction given by the State courts will be adopted by us. And we adopt the construction of a State statute settled in the courts of the State, though it may not accord with our opinion. There is every reason for this in the consideration of statutes defining the duties of State officers. It is true that when we have been called upon to consider contracts resting upon State statutes, contracts valid at the time they were made according to the decision of the highest courts of the State—contracts entered into on the faith of these decisions—we have declined to follow later State court decisions impairing their validity. But in other cases we have held ourselves bound to accept the construction given by the courts of the State to their own statutes." (Green *vs.* Neal's Lessee, 6 Peters, 231; Swydan *vs.* Williamson, 24 Howard, 428; Leffingwell *vs.* Warren, 2 Black, 599; McKee *vs.* Delacy, 5 Cranch, 22.)

In Leffingwell *vs.* Warren, *supra*, the court says: "The construction given to a statute of the State by the highest tribunal of such State is regarded as a part of the statute and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest settled adjudication."

The only case in which the Federal court will refuse to follow the latest decisions of the State courts is where the State courts have construed a statute, and upon the faith of such construction contracts have been made, and thereafter the State court reverses its former decision. The Federal courts will not follow in such cases, because the latest decision impairs a contract made upon the faith of the former decision. But even this power to depart from the latest rulings of the State courts has been seriously doubted and forcibly assailed. (See dissenting opinion of Justice Miller, Gilpeke *vs.* Dubuque, *supra.*)

In Howard *vs.* Deposit Bank (opinion filed November 25, 1882, and not yet reported), the court of appeals of Kentucky had occasion to pass upon the statute of February 27, 1867, and adheres to its former ruling in 13 Bush., 101, Daviess County Court *vs.* Howard. So, without question, we have this settled ruling of the highest court of this State upon one of the State statutes, and it does not fall under the exception above stated.

The cases relied on by counsel for defendant in error have no application to the case at bar; they fall under the purview of Art. 1, sec. 10, of the Federal Constitution, which provides: "That no State shall pass any *ex-post facto* law, or law impairing the obligations of contracts."

After a careful examination of the authorities of this Court, we take the rule to be that the line of decisions relied on by counsel fall under this provision of the Constitution, or else are cases where the question was not in the construction of the State law, but on the effect of the evidence showing the compliance with the State law.

We think Daviess county ought not to be compelled to pay more than the $250,000, and if our views on this question are not well taken as to what bonds are void, then it would seem just to scale all the bonds and let the holders of all share equally. This rule has been adopted in similar cases in some of the States, and there is pending in the State courts of Kentucky a proceeding to scale the bonds in this instance. The county will provide the trust-fund to pay what it agreed to pay, and it is immaterial to it how this fund is distributed among the parties entitled to receive it, provided that when the fund is paid out the whole debt shall be liquidated.

We most respectfully ask a reversal of the judgment below.

J. D. ATCHISON,
For Plaintiff in Error.

GEO. W. JALLY,
Counsel.

AUTHORITIES CITED.

2 Acts Legis. Ky., 1867–'8, p. 83.
Howard *vs.* Daviess County, 13 Bush., 101.
Constitution Ky., sec. 30, art. 2.
B. E. & M. R. R. Co. *vs.* Warren Co. Ct., 10 Bush., 718.
Judge of Campbell Co. Ct. *vs.* Taylor, 9 Bush., 206.
Martin *vs.* McKenny, Sneed, 321.
Gilbert *vs.* Bartlett, 9 Bush., 53.
Wells *vs.* Supervisors, 102 U. S., 625.
Bullock *vs.* Curry, 2 Metcalf, 174.
W. & Mt. S. T. P. R. R. Co. *vs.* Clark Co. Ct., 3 Metcalf, 141.
Shelby Co. Ct. *vs.* C. & O. R. R. Co., 8 Bush., 216.
Loan Association *vs.* Topeka, 20 Wallace, 655.
Ryan *vs.* Lynch, 68 Ill., 160.
Fletcher *vs.* Leight, 4 Bush., 307.
Mercer Co. Ct. *vs.* Ky. River Nav. Co., 8 Bush., 367.
Harrison Co. Ct. *vs.* Smith's Admin'r, 15 B. Mon., 156.
McClure *vs.* Township of Oxford, 99 U. S., 429.
Board of Commissioners *vs.* McClintock, 51 Ind., 325.
Borroughs on Pub. Securities, 256–60.
Lewis *vs.* Commissioners of Bourbon Co., 12 Kuno, 1 and 6.
Commissioners *vs.* Thayer, 94 U. S., 641.
Riggs *vs.* Johnson County, 6 Wallace, 177.
Revised Statutes U. S., p. 136, chap. xii, sec. 720.
Gilpeke *vs.* Dubuque, 1 Wallace, 210.
Douglass *vs.* County of Pike, 11 Otto, 677.
Supervisors *vs.* United States, 18 Wallace, 71.
Green *vs.* Neal's Lessee, 6 Peters, 231.
Swydam *vs.* Williamson, 24 Howard, 428.
Leffingwell *vs.* Warren, 2 Black, 599.
McKee *vs.* Delacy, 5 Cranch, 22.
Constitution U. S., art. 1, sec. 10.
Marsh *vs.* Fulton County, 10 Wallace, 676.

Aspinwall *vs*. Daviess County, 22 Howard, 378.
1 Dillon on Municipal Corporations, secs. 426-55.
United States *vs*. County of Macon, 99 U. S., 591.
Floyd's Acceptances, 7 Wallace, 666.
Anthony *vs*. Jasper County, 101 U. S., 693.
People *vs*. Alfred Burk, 13 Wis., 432.
Berliner *vs*. Town of Waterloo, 14 Wis., 378.
Leavenworth *vs*. County of Platte, 42 Mo., 171.
Parkham *vs*. Jefferson County, 2 Col., 338.
Marshall *vs*. Sillman, 61 Ill., 281.
Wiley *vs*. Sillman, 61 Ill., 170.
Township of Elmwood *vs*. Marey, 92 U. S., 289.
Borroughs on Pub. Securities, 366.
Township of East Oakland *vs*. Skinner, 94 U. S., 259.
Cooly on Const. Lim., 150, 151.
Harshman *vs*. Bates County, 92 U. S., 569.
Jarrold *vs*. Mobberly, 103 U. S., 180.
Allan *vs*. Louisiana, 103 U. S., 80.
Town of Concord *vs*. Portsmouth Sav. B'k, 92 U. S., 625.
McPherson vs. Foster Bros., 43 Iowa, 41.
Buchanan *vs*. Litchfield, 102 U. S., 287.
Ogden *vs*. County of Daviess, 101 U. S., 634.
County of Green *vs*. Damill, 102 U. S., 187.
Louisiana *vs*. Wood, 102 U. S., 294.
Horton *vs*. Town of Thompson, 71 V. & P., 513.
Scipio *vs*. Wright, 101 U. S., 675.

117-657

Office Supreme Court U. S.
FILED.
DEC 21 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885—No. ~~484~~. 186

THE COUNTY OF DAVIESS, - - - - - - - - Plaintiff in Error,

VERSUS

J. M. DICKINSON, - - - - - - - - - - - - - Defendant in Error.

Argument of P. B. MUIR, for Defendant in Error

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1885.—No. ~~464.~~ 186

THE COUNTY OF DAVIESS, *Plaintiff in Error*,

VERSUS

J. M. DICKINSON.

IN ERROR TO THE U. S. CIRCUIT COURT, KENTUCKY DISTRICT.

Argument of P. B. MUIR, for Defendant in Error.

STATEMENT OF THE CASE.

The plaintiff in error is one of the counties of Kentucky. The defendent is a citizen of Tennessee. The judgment complained of was rendered by the U. S. Circuit Court, 6th Circuit, Kentucky District, for the sum of $21,935.94, with interest and costs, upon certain bonds and coupons issued by Daviess County, under and by virtue of the 19th section of an act of the Legislature of Kentucky, approved February 27, 1867, and entitled "An Act to Charter the Owensboro & Russellville Railroad Company." The section referred to reads as follows, to wit:

§ 19. "That the County Courts of Daviess, Ohio, McLean, Muhlenberg, and Logan Counties, shall have power, and are hereby authorized, to subscribe to the capital stock of said company in such number of shares as may be determined by said county courts respectively, and to levy upon the tax-payers of such counties respectively such taxes as may be necessary to pay the stock so by them respectively subscribed; and said county courts may, if they shall deem it prudent, issue the bonds of said counties respectively for the amount of stock subscribed, or any part thereof; said bonds to be in such sums, and payable at such times, as said county courts may determine upon.

"But before such stock shall be subscribed by said county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock, and the amount thereof (to be suggested and fixed by the commissioners named herein in each of said counties), at an election to be held on the third Monday in April, 1867, in each of the counties aforesaid, due notice of which shall be given by the sheriffs in each of said counties, by written advertisements posted in each of the voting precincts thereof for at least thirty days before said day of election; and said stock shall not be subscribed unless a majority of all the votes cast at said election be in favor of such proposition; and said county courts have power to appoint suitable and necessary officers to conduct such election, and to provide for the collection of the tax aforesaid, if a majority of the votes cast at such election is in favor of the proposition aforesaid." (Acts Ky. Legis., 1867, Vol. 2, page 83.)

The twentieth section provides that the tax-payers shall be substituted for the county as stockholders, and entitled to all the privileges of stockholders, by exhibiting to the president and directors of the railroad company their tax receipts and receiving certificates of stock therefor.

Other parts of said act throw no light whatever on this controversy, and therefore will not be noticed.

On the 14th of March, 1867, the Daviess County Court, at a special term, made the following order to wit (Rec. page 19):

"OWENSBORO, March 14, 1867.

"Pursuant to an act of the General Assembly of the Commonwealth of Kentucky, entitled an act to charter the Owensboro & Russellville Railroad Company, approved February 27, 1867, it is ordered and adjudged by the County Court of Daviess County that there shall be and there is hereby submitted to the voters of said county the proposition, 'Shall or shall not the County Court of Daviess County subscribe ten thousand shares, being the sum of two hundred and fifty thousand dollars, to the capital stock of said Owensboro & Russellville Railroad Company.' To be voted and determined upon by said voters at an election to be held in each of the voting precincts of said county, on the third Monday in April, 1867, and the Sheriff of Daviess County is required to notify the voters of said county of said election by written notices posted in each of said precincts for thirty days before the day of said election.

" A copy, attest: " M. S. MATTINGLY, *Clerk.*"

The election was held on the 15th of April, 1867, and the majority voted in favor of the proposition. The county court so adjudged, and to that tribunal, as is plainly deducible from the nineteenth section (*supra*) of the act, the exclusive power to decide the question was delegated by the legislature.

After various meetings, at which the question of subscribing to the capital stock, as voted by the people, seems to have been discussed, the county court on the 13th of April, 1868, made the following order, to wit (Rec. page 21):

"STATE OF KENTUCKY,
DAVIESS COUNTY COURT. } April Term, 1868.

" At a county court, begun and held in and for the County of Daviess, at court hall, on the 13th day of April, 1868.

" Present: GEO. W. TRIPLETT, *Judge.*

" Pursuant to an order of adjournment made at January term, the following justices of the peace appeared in court and took their seats, viz: J. C. Blandford, B. E. W. Stout, Ben. Alsop, W. H. Frey, J. A. Small, W. H. Monarch, Edwin Goodwin, Phocion Harris, J. G. Small, George T. Hawes, R. C. Barrett, James Milton, A. J. Philpott, R. R. Cooms, Thomas J. Monarch, James Hill, Ed. Berry, C. V. Pearce, J. A. Robertson.

" The motion of E. C. Berry, submitted at the October term, 1867, and which has been continued from time to time, and which is as follows, viz:

" 'On motion of E. C. Berry the following order was brought up before the court, viz: In obedience to the will of the majority of the voters and tax-payers of this county, as expressed and recorded in the poll-book at the election held on the 15th day of April, 1867, it is now ordered that this court do subscribe two hundred and fifty thousand dollars to the capital stock of the Owensboro & Russellville Railroad Company, and George W. Triplett, presiding judge of this court, is ordered and directed to make said subscription of said stock in manner and form as prescribed by the charter incorporating said company.

"Coming up for consideration, and the court being sufficiently advised, the said motion was submitted to the court, and yeas and nays being demanded, the following justices voted in favor of the said motion, viz: E. C. Berry, W. H. Frey, Ben. Alsop, W. H. Monarch, A. J. Philpott, R. R. Cooms, Phocion Harris, J. A. Small, J. G. Crow, J. A. Robertson, J. C. Blandford, and Thomas J. Monarch.

"And the following justices voted against it, viz: Geo. T. Hawes, C. V. Pearce, R. C. Barrett, James Milton, B. W. E. Stout, Edwin Goodwin, and James Hill.

"Whereupon it is considered by the court that the said motion of E. C. Berry be and the same is hereby adopted; and it is further ordered that G. W. Triplett, E. C. Berry, and J. G. Coom be and they are now hereby appointed a committee for and on behalf of this court to cast the vote of the stock that may be subscribed by the said Triplett, as directed in the motion and order aforesaid, in any election that may be held by the president and directors of said railroad company for directors.

"A copy, attest: M. S. Mattingly, *Clerk*."

In pursuance of the foregoing order, the county judge, on behalf of the county court, subscribed ten thousand shares to the capital stock of the railroad company, and on the 13th day of June, 1868, the county court again met and made the following order, to-wit:

"State of Kentucky,
Daviess County Court. } July Term, 1868.

"At a county court begun and held in and for the County of Daviess, at county court room in court-house, on the 13th day of June, 1868.

"Present: George W. Triplett, *Judge*.

"In accordance with order of adjournment made at the last April term, the following magistrates appeared in court and took their seats, viz: Ben. Alsop, W. H. Frey, R. R. Cooms, Thomas J. Monarch, George T. Hawes, E. C. Berry, Ed. Goodwin, James Milton, Phocion Harris, J. C. Blandford, J. G. Crow, W. H. Monarch, James A. Small, John A. Robertson, and A. J. Philpott.

"It is ordered that George W. Triplett, presiding Judge of Daviess County Court, William B. Tyler, and E. C. Berry be and are hereby appointed a committee on behalf of the County Court of Daviess County, to have bonds executed and prepared *of a sufficient amount to satisfy and pay off the subscription on the part of the County of Daviess to the Owensboro & Russellville Railroad Company;*" that said bonds be executed and made payable as follows, viz:

"FIFTY THOUSAND dollars, FIVE YEARS from date.

"FIFTY THOUSAND dollars, TEN YEARS from date.

"SEVENTY-FIVE THOUSAND dollars, FIFTEEN YEARS from date.

"SEVENTY-FIVE THOUSAND dollars, TWENTY YEARS from date.

"The county reserving the right to pay at any time after five years; the interest on the same at the rate of six per cent per annum, to be due and payable semi-annually at such place or places as the committee may determine upon; and that said bonds shall be of such denominations as said committee shall deem best, with interest coupons attached, and said bonds shall be signed by the presiding Judge of Daviess County, and the Clerk of the County Court of Daviess County, and have the seal of the county impressed on each; and said committee, or a majority of same, may sell and dispose of said bonds either to the Owensboro & Russellville Railroad Company, or to individuals or other corporations, on such terms as said committee may deem best and most advisable to the interests of the County of Daviess in paying the subscriptions of said county to the said Owensboro & Russellville Railroad Company; and they are hereby authorized to raise funds from said bonds, either by sale to individuals or corporations, or by contract with said railroad company, so as to pay off and meet all calls made by the Owensboro & Russellville Railroad Company by reason of the subscription of stock on behalf of the County of Daviess to said railroad company.

"It is further ordered, that whenever any bond shall be sold or otherwise disposed of by said committee for the purposes aforesaid, that a list of said bonds shall be made, giving the amount, number, and denomination of same, with the amount of coupons attached to each at the time of their disposal; and said list so furnished shall be entered upon the records of the County Court of Daviess by the clerk of same.

"The presiding Judge of Daviess County Court is hereby empowered and directed to take all necessary and proper steps to secure the payment of all interest that may accrue by reason of the sale of any of the bonds herein mentioned; and, to do so, it is hereby made his duty to appoint two or more collectors of the railroad tax, taking good and sufficient bonds from each to diligently perform their duties as such, and to pay over all moneys that may come to their hands as collectors aforesaid, whenever so ordered and directed; and a special tax, to be called the railroad tax, of twenty-five cents on each and every one hundred dollars of taxable property in the County of Daviess is now levied, and is to be due and payable on or before the first day of December of each year until this court shall otherwise order." (Rec. pages 22, 23.)

Bonds were accordingly executed and issued by the county court, signed by the county judge, and countersigned by the county court clerk. They were all payable to bearer, had semi-annual interest coupons attached, and were negotiable. They were dated January 1, 1869, and were issued in five distinct series, each series having a distinct letter and progressive serial numbers, commencing with the No. 1.

Series A, for $50.00 each, payable five years after date, and numbered from 1 to 511, inclusive	$25,550.00
Series B, for $100.00 each, payable five years after date, and numbered from 1 to 257, inclusive	25,700.00
Series C, for $100.00 each, payable ten years after date, and numbered from 1 to 212, inclusive	21,200.00
Series D, for $500.00 each, payable fifteen years after date, and numbered from 1 to 153, inclusive	76,500.00
Series E, for $500.00 each, payable twenty years after date, and numbered from 1 to 255, inclusive	127,500.00
Series F, for $500.00 each, payable ~~twenty~~ years after date, and numbered from 1 to 88, inclusive	44,000.00
Making a total of	$320,450.00
Deduct the sum named in the county court order	250,000.00
And we have as the apparent excess of issue	$70,450.00
The real excess, however, is not so large, for Nos. 62, 63, 64, 79, 86, and 113, of Series D, and 119 and 120 of Series A, were returned to the county court and cancelled (Pages 28 and 29). These amounted to	3,100.00
Which, deducted from the apparent excess, will leave as the real supposed excess, or overissue	67,350.00

ten /

It thus appears that bonds were issued by the Daviess County Court to the amount of $317,350, and the county court now maintains that, as to the excess over $250,000, said bonds are void. That they were issued *bona fide* is virtually conceded. That within three months they were all sold by the county court for their fair market value and the proceeds received by the county, is not denied. That defendant purchased the bonds in controversy from bankers in good faith for value and before maturity is clearly shown (Rec. page 31.) That for several successive years before defendant's purchases, taxes were regularly levied and collected to pay the interest on the bonds, disputed and undisputed, is admitted. (Rec. page 29.) That a railroad was built across the County of Daviess with the money derived from a sale of the bonds, is conceded. That the conduct of the county court and of the citizens of Daviess County, from the date of the bonds to the purchases by defendant, was such as to lead the public to believe them valid, and to give them credit in the market, is indisputable. That long before this suit was filed many of the bonds first maturing were paid and canceled, is admitted. (Rec. page 29.) And yet, notwithstanding all these things, and the indorsement upon each of the bonds, to which I will hereafter refer, the validity of these bonds is now contested by the Daviess County Court.

On the 12th of May, 1875, more than six years after the bonds were issued, the first public complaint was made that the county court had exceeded its powers. This complaint was made by Howard and others, voters and tax-payers of Daviess County, who exhibited their petition in equity in the Daviess Circuit Court against the Daviess County Court, the railroad company, certain named banks, and "all other owners of the bonds of Davies's County, issued in discharge of a pretended subscription to the said railroad company, which owners, together with their names, are unknown to plaintiff." (Rec. page 33.) The defendant was not named as a party to that suit. He then held some of the bonds and purchased others in July, 1875. (Rec. pages 12 and 32.) It is evident that he knew nothing of the suit, for he paid a higher price after than before the suit. (Page 12.) It will be seen that the contention of the tax-payers in that suit was, that *all* the bonds were invalid. The court decided that the bonds were valid to the extent of $250,000.00, and invalid as to the residue, or excess over that sum. In distinguishing the valid from the invalid, the court held the highest numbers in each of the five series to have been issued without authority, and therefore void. That is to say, following the order of the county court, of the 13th of June, 1868, *supra*, his Honor held that in—

/2

Series A, Nos. 501 to 511, inclusive, were invalid	$550.00
Series B, Nos. 151 to 257, inclusive, were invalid	700.00
Series C, Nos. 200 to 212, inclusive, were invalid	1,200.00
Series D, Nos. 151, 152 and 153, were invalid	1,500.00
Series E, Nos. 151 to 255, inclusive, were invalid	52,500.00
Series F, Nos. 61 to 88, inclusive, were invalid	14,000.00
Thus making the original excess	$70,450.00
But, deducting the eight canceled bonds	3,100.00
Will leave the real excess held invalid to be	$67,350.00

as before stated.

The judgment of the Daviess Circuit Court was affirmed on appeal. (Howard v. Daviess County, 13 Bush, 101.) The defendant in error was not a party to that appeal. (The opinion of the Court of Appeals may be found on pages 99 to 106, inclusive, of this record.)

It will be seen that no attention was paid to the *times* when the bonds were sold and delivered. Of course so long as they remained with the county court they could not have been treated as binding obligations. They were issued and took effect as and when delivered—not before. Now, on the 22d of March, 1868, the *last* bonds were sold and delivered. They were all delivered at the same time and to the same person. (Page 28.) They were all of series E, for $500 each, numbered from 71 to 255, inclusive, aggregating 185 bonds and amounting to $92,500.00. (Rec. page 31.) Only 105 of these bonds were held invalid by the State court, while, if any are invalid, and the time of delivery respected, these last issued bonds more than cover the entire excess. But as the whole 185 were issued and delivered at the *same* time, and the amount is $92,500.00, while the entire excess is only claimed to be $67,350.00, there must have been in the lot at least fifty valid bonds. The bonds delivered before the 22d of March, 1870, did not in the aggregate amount to $250,000.00. Even if the county was limited to that sum, it had not yet reached its limit by $25,150. If it had stopped selling, before the 22d of March, all the bonds previously sold would have been valid. If it had only sold and delivered fifty of the 185 bonds sold on the 22d of March, 1870, the validity of all the bonds would have been unquestionable, even though the fifty had been of the last and highest numbers in the series. But the county on that day sold and delivered the entire 185 in a single lot to one person and at one time. That fifty of them are valid is certain. Which fifty? Who can separate the good from the bad? It can not be done. And the county, having caused the confusion, must pay all. I hope to show that all are good, and that Daviess County must pay them all, even though the State court held otherwise in a contest between the principal and agent, the tax-payers and the county court.

The bonds are all in the same form, only varying in letters, numbers, and amounts, as before explained. Each bond has upon its back the same indorsement, and for convenience I will here copy both bond and indorsement:

"UNITED STATES OF AMERICA,
COUNTY OF DAVIESS, STATE OF KENTUCKY.
" On account of stock subscribed in the Owensboro & Russellville Railroa

"—— year~~s~~ after date the County of Daviess, in the State of Kentucky, promises to pay to bearer the sum of —— dollars, with interest thereon at the rate of six per cent per annum, payable semi-annually upon presentation of the proper coupons hereto attached. The principal and interest being payable at the Deposit Bank, Owensboro, and to secure the payment of which the property and credit of the county are pledged.

"In testimony, the Judge of the County Court of Daviess County has hereunto set his hand and affixed the seal of the said court, and caused the same to be countersigned by the clerk of said court, who has also signed the coupons hereto attached, this the — day of——, 18—.

{ SEAL }

"GEO. W. TRIPLETT,
"T. C. JONES, *County Clerk.* *Judge of County Court.*"

The coupons were all signed by the clerk alone, and are in the following form:

"No. ——.

"The County of Daviess, in the State of Kentucky, will pay to the bearer —— dollars, at the Deposit Bank, in the City of Owensboro, on the —day of —— 18—, being semi-annual interest on County Bond No.—, dated — day of —, 18—.

"T. C. JONES, *County Clerk.*"

Each bond had its letter and number, as before explained, and upon the back of each and every bond there was plainly printed the following indorsement, to wit:

"This bond is issued as authorized by an act of the Kentucky Legislature, approved February 27, 1867, entitled 'An Act to Charter the Owensboro & Russellville Railroad Company,' and by an ordinance of the County Court of Daviess in pursuance thereof.

(Signed) "GEORGE W. TRIPLETT,
(Rec. page 25.) "*Judge of the County of Daviess.*"

In 1870 and in July, 1875 (page 12), the defendant in error purchased in the open market, from bankers, in good faith, for value and before maturity, the bonds in suit, to wit, twelve bonds of series F, Nos. 4, 9, 10, 28, 41, 42, 52, 53, 54, 58, 59, and 60, which are undisputed; twenty-one bonds of series F, numbered, the lowest 61, and the highest 88, all of which are disputed; three bonds, numbered 151, 152, and 153, of series D, which are disputed; twenty-three bonds of series E, numbered, the lowest 151, and the highest 245, all of which are also disputed by the county court.

The contention of the county court now is, that the rule prescribed by the State court, in the Howard case (*supra*) is the true one, and that, therefore, as the twenty-one bonds of series F have numbers beyond the number 60, they are void; and that as the three bonds of series D have numbers beyond the number 150, they too are void; and that as the twenty-three bonds of series E have numbers beyond the number 150, they also are void.

The U. S. Circuit Court, holding all the bonds to be valid, instructed the jury as follows, to wit:

> 1. "The court instructs the jury that if they believe from the evidence that the plaintiff purchased the bonds and coupons sued for without notice, that more than two hundred and fifty thousand dollars of bonds had been issued by defendant, and that he so purchased before their maturity, and for value, the law is for the plaintiff.
>
> 2. "The court further instructs the jury that the plaintiff, before purchasing said bonds, was not bound to examine the records of the Daviess County Court, and can not be presumed to have known what said records contained when he made the purchase."

The jury returned a verdict for the defendant in error, and the court rendered judgment against the county, to reverse which this writ of error has been sued out.

What errors may hereafter be formally assigned, I do not know, but, assuming that the crucial questions in the case are all involved in the rulings of the court upon the pleadings and in the two instructions just referred to, I respectfully submit the following

ARGUMENT FOR THE DEFENDENT IN ERROR.

1. And the first thing to be considered is, the effect of the decision of the Kentucky Court of Appeals upon the right of recovery in this case. This question was raised by the second paragraph of the answer, to which a demurrer was sustained. The case of Howard v. Daviess County does decide, in effect, that the bonds in suit are invalid. But I insist that the Federal courts are not concluded by that de-

cision, and, besides, that the defendant in error is in no degree affected by it, as he was not a party to the suit. That case developed a contest between principal and agent—the people of the county and the county court—and as between them the decision may have been right. The learned judge who delivered the opinion was careful to say it was a "controversy between the agent and principal." (Rec. page 103.) It would certainly have been more effectual and more just if the people had obtained their injunction before the bonds fell into the hands of innocent purchasers. This suit is not a "controversy between agent and principal," but presents very different questions, and is between very different parties. The questions involved in this case relate to commercial securities, and belong to the domain of general jurisprudence. And this court will not follow the decision of the State court unless satisfied that the decision is right. (2 Dan. on Neg. Inst. sec. 1526; Alcott v. Supervisors, 16 Wall. 690; Township of Pine Grove v. Talcott, 19 Wall. 667—followed in many case by this court.) We are not, therefore, concluded or even embarrassed by the decision of the Kentucky Court of Appeals in the case referred to. Profound respect is due, and, no doubt, will be accorded by your Honors to that court, but you are not bound by its decisions in cases like this, and will only follow its opinions as they may be satisfactory to you. This rule is stated with so much emphasis and enforced with so much ability by Mr. Justice Woods in the case of Pana v. Bowles (107 U. S. 540), and by Mr. Justice Mathews in the case of Carroll County v. Smith (111 U. S. 562) that I do not feel at liberty to discuss it further.

I will endeavor to show that the ruling in the Howard case is not only indefensible, but that the real questions in this case were not even considered in that case. Preliminary to that discussion, some general propositions may be stated which are either undisputed or too well settled to need the support of argument. The bonds in suit are all payable to bearer, and were all signed by the county judge and countersigned by the clerk. The signatures are admitted to be genuine, and the bonds were all sold for value by the county judge within three months after their date. Being in possession of defendant in error, the presumption of law is that he acquired them "*bona fide*, for full value, in the usual course of business, before maturity, and without notice of any circumstances impeaching their validity, and that he is the owner thereof." (1 Dan. on Neg. Inst., sec. 812, and cases there cited.) "Such instruments are commercial paper, and governed by the rules of the law-merchant concerning such paper, and that as respects a holder for value, before due, without notice of facts constituting a defense thereto, the only defense which is available is that there was *no power* in the defendant corporation to issue the bonds or instruments in question." (Dillon's Law of Mun. Bonds, sec. 7.) "Bonds payable to bearer, issued by a municipal corporation, . . . if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but, if issued by such a corporation, which possessed *no power* from the *legislature*, they are invalid, even in the hands of innocent holders." (St. Joseph's Township v. Rogers, 16 Wall. 644, 659.) "*Irregularities* in the exercise of the power, as against a holder for value, without notice of such irregularities, constitute no defense." (Dill.'s Law of Mun. Bonds, sec. 7; Knox County v. Aspinwall, 21 How. 539; Marsh v. Fulton County, 10 Wall. 676, and many later cases in this court.) Where the *power* to issue negotiable bonds is granted by the legislature to the county courts, purchasers before maturity and for value may presume that the officers have done their duty and are only bound to take notice of the *power* conferred by the legislature. They are presumed to have examined the act of the legislature, and therefore to have known its provisions, but they are not bound to examine the records of the county court, and are not, therefore, presumed to have seen them. Such is certainly the doctrine of this court in cases where the bonds contain recitals like the indorsements on these cision, and, besides, that the defendant in error is in no degree affected by it, as he was not a party to the suit. That case developed a contest between principal and agent—the people of the county and the county court—and as between them the decision may have been right. The learned judge who delivered the opinion was careful to say it was a "controversy between the agent and principal." (Rec. page 103.) It would certainly have been more effectual and more just if the people had obtained their injunction before the bonds fell into the hands of innocent purchasers. This suit is not a "controversy between agent and principal," but presents very different questions, and is between very different parties. The questions involved in this case relate to commercial securities, and belong to the domain of general jurisprudence. And this court will not follow the decision of the State court unless satisfied that the decision is right. (2 Dan. on Neg. Inst. sec. 1526; Alcott v. Supervisors, 16 Wall. 690; Township of Pine Grove v. Talcott, 19 Wall. 667—followed in many case by this court.) We are not, therefore, concluded or even embarrassed by the decision of the Kentucky Court of Appeals in the case referred to. Profound respect is due, and, no doubt, will be accorded by your Honors to that court, but you are not bound by its decisions in cases like this, and will only follow its opinions as they may be satisfactory to you. This rule is stated with so much emphasis and enforced with so much ability by Mr. Justice Woods in the case of Pana v. Bowles (107 U. S. 540), and by Mr. Justice Mathews in the case of Carroll County v. Smith (111 U. S. 562) that I do not feel at liberty to discuss it further.

I will endeavor to show that the ruling in the Howard case is not only indefensible, but that the real questions in this case were not even considered in that case. Preliminary to that discussion, some general propositions may be stated which are either undisputed or too well settled to need the support of argument. The bonds in suit are all payable to bearer, and were all signed by the county judge and countersigned by the clerk. The signatures are admitted to be genuine, and the bonds were all sold for value by the county judge within three months after their date. Being in possession of defendant in error, the presumption of law is that he acquired them "*bona fide*, for full value, in the usual course of business, before maturity, and without notice of any circumstances impeaching their validity, and that he is the owner thereof." (1 Dan. on Neg. Inst., sec. 812, and cases there cited.) "Such instruments are commercial paper, and governed by the rules of the law-merchant concerning such paper, and that as respects a holder for value, before due, without notice of facts constituting a defense thereto, the only defense which is available is that there was *no power* in the defendant corporation to issue the bonds or instruments in question." (Dillon's Law of Mun. Bonds, sec. 7.) "Bonds payable to bearer, issued by a municipal corporation, . . . if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but, if issued by such a corporation, which possessed *no power* from the *legislature*, they are invalid, even in the hands of innocent holders." (St. Joseph's Township v. Rogers, 16 Wall. 644, 659.) "*Irregularities* in the exercise of the power, as against a holder for value, without notice of such irregularities, constitute no defense." (Dill.'s Law of Mun. Bonds, sec. 7; Knox County v. Aspinwall, 21 How. 539; Marsh v. Fulton County, 10 Wall. 676, and many later cases in this court.) Where the *power* to issue negotiable bonds is granted by the legislature to the county courts, purchasers before maturity and for value may presume that the officers have done their duty and are only bound to take notice of the *power* conferred by the legislature. They are presumed to have examined the act of the legislature, and therefore to have known its provisions, but they are not bound to examine the records of the county court, and are not, therefore, presumed to have seen them. Such is certainly the doctrine of this court in cases where the bonds contain recitals like the indorsements on these bonds. The real question, therefore, in all such cases is one of *power*. In this case no other defense is made, or at least none that is entitled to respect. It is admitted that a majority of the people voted for the subscription, and it is not contended that the election was, in any respect irregular, but it is earnestly insisted that the county court had no power to issue the bonds sued on, or any of them except the twelve before referred to.

2. Let us, therefore, examine this question of power. It may be admitted (though I do not) that before the bonds were issued, or at any time before they fell into the hands of innocent *bona fide* holders for value, the tax-payers could have obtained an injunction, enjoining and restraining the issue of an excess of bonds over two hundred and fifty thousand dollars. But the question becomes a very different one after tax-payers have remained silent for years and until innocent purchasers have parted with their money, and the tax-payers have had the benefit of it.

In considering this question, there seems to have been some confusion as to the source of the power. The act of the legislature, and that alone, conferred the power. It is a solecism to say that the county court derived any power from itself, or from its own orders. The power was delegated by the legislature to make subscription to the stock and to execute bonds. There was but one condition annexed, and that was that the proposition to subscribe should be first submitted to popular vote and receive the approval of the majority. That was done. And the power to subscribe was therefore complete, and the subscription was made. The County of Daviess thus became a debtor to the Owensboro & Russellville Railroad Company in the sum of $250,000. The subscription was not payable in the bonds of the county, but in money. It was then due. Now it may well be contended that the express power to create this debt carried with it the implied power to issue bonds to an amount sufficient, at their market value, to pay the debt.

The Supreme Court of Ohio so held in the case of Bank v. Chillicothe, 7 Ohio. The doctrine in Iowa and Wisconsin is the same. (Hull, &c. v. County of Marshall, 12 Iowa, 142; Mills v. Gleason, 11 Wis. 470; State v. Madison, 7 Wis. 688.) And such seems to have been the ruling of this court in Lynde v. County, 16 Wall. 12. If this be the true rule, there is of course an end of all controversy in this case, for it is not pretended that more bonds were issued than, at their then market value, were necessary to pay the debt. The legislative authorization and the vote in favor of the subscription carried with them the power to pay the debt, as such debts are usually paid, by the issue and sale of negotiable bonds.

But we are not left to inference or implication for the power to issue bonds. To say the least, the county court had express power to issue bonds to the amount of $250,000. This limit, if it be such, *was not fixed by the statute.* It was made by the county court in fixing a limit to the subscription. The act of the legislature is comprehensive and general in its grant of powers, fixing no limit whatever to the amount of subscription. It says the "counties (including Daviess) shall have power, and are hereby authorized to subscribe to the capital stock of said company in *such number of shares* as may be determined by said county courts respectively," and to levy upon the tax-payers such taxes as may be necessary to pay the amount subscribed, provided the majority of the voters of the county should vote in favor of such subscription. It will be observed that no sum is named in the statute. That is left entirely to the county court and the vote of the people. And the act, as may be clearly gathered from its provisions, makes the county court the sole judge of the action of the people.

If the act had gone no further than this grant of power to create the debt, by subscription to the stock, it could hardly be doubted, under the authorities just cited, especially the case of Lynde v. County, decided by this court in 1872, that the county had the implied power to issue and sell all the bonds which were necessary to pay the debt. And what could be more just than the exercise of such a power? And how unconscionable is the complaint of the county in this case, when it is remembered that only enough bonds were issued to pay the county debt (an undisputed debt), and when it is considered that by silence and repeated recognitions of their validity by the county court and the people of the county through six years, innocent purchasers were induced to buy the bonds—they standing by and witnessing the use of the money in the construction of a railroad across the county. Under such circumstances, and in such a case, the court will not be inclined to overrule the case of Lynde v. County.

But, unnecessarily it may be, the legislature granted to the county court express power to issue bonds to pay *any* subscription it might make. It is true the language of the act, in this connection, is not as clear as could be desired. After authorizing the creation of the debt, its payment is next provided for. The levy of taxes to pay the *debt* (not the bonds) is made imperative. The issue of bonds is made discretionary with the county court: "And said county courts may, *if they shall deem it prudent*, issue the bonds of said counties respectively for the *amount* of stock subscribed, or any part thereof; said bonds to be in such sums and payable at such times as said county courts may determine upon." The large discretion given to the county court by this language is very striking. It was certainly not intended as a limitation upon the implied power which had just been brought into existence. And when it is said, after the power to create a debt had been granted, that the county court might, in its discretion, issue bonds for the "amount of the stock subscribed," it was not intended by the legislature to *limit* the extent of the issue. But, clearly, it was the intention of the legislature to confer upon the county the power to issue such bonds as might, at their market value, be necessary to pay the "amonnt of stock subscriben." It was known to the legislature that such bonds could not then be sold at par. It could not have been contemplated that the bonds would be exchanged with the railroad company, at par, for stock. For there is nothing in the act requiring the railroad company to accept the bonds. As we have just seen, the county was not required to execute bonds, but after the vote the county court was bound to create the debt by subscription. It was, therefore, contemplated by the legislasure that the bonds, if and when issued, would be sold at their market value, and that by such sales the subscription to the stock would be paid. The subscription being $250,000, and bonds to the amount of $317,350 being necessary to pay it, the county court had not only implied, but express power to issue them.

3. But, conceding, for the purpose of argument, that the county court *exceeded* its power—that, being the authorized agent of the county to issne bonds to the extent of $250,000, all bonds issued in excess of that sum was an *abuse* of power—it by no means follows that such bonds are invalid when held by innocent purchasers before maturity and for value.

This is not like the case of the Floyd acceptances. There was a total *absence* of *all power* in that case. In this case the power is present, but, it is said, has been exceeded. The act of the legislature is the power of attorney under which the county court acted. It was the duty of my client to look into that act before he purchased. Looking, he found the power to subscribe for stock and to issue bonds. He was not bound to look further, but might rely upon the presumption that the official agent had discharged his duty, and that the single condition precedent (the vote) had been performed, (Knox v. Aspinwall, 21 Howard; Town of Coloma v. Eaves, 92 U. S. 484; Humbolt Township v. Long, 92 U. S. 642; Marcy v. Township of Oswego, 92 U. S. 637.) "When a corporation has power under *any* circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under *the* circumstances which give the requisite authority, and are no more liable to be impeached in the hands of such a holder than any other commercial paper." (City of Lexington v. Bullen, 13 Wall. 296.)

In the case of Marcy v. The Township of Oswego, the defense was the same as in this case, to wit: an *overissue* of bonds, contrary to the statute. "The bond (says Judge Dillon referring to that case) contains *no statement on this point*, but it was held by the Supreme Court that the recital in the bonds estopped the township from making this defense against a *bona fide* holder. The act of the State of Kansas, under which the bonds were executed, provided "that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest." The bonds were executed by the township of Oswego, and fell into the hands of *bona fide* purchasers. But payment was refused, suit brought, and the township pleaded, as in this case the County of Daviess has pleaded, that the amount of the bonds was in *excess* of the amount allowed by the statute—that, to pay the interest, required a tax of more than one per cent per annum. This defense was sustained by the circuit justice, but was held unavailing by this court. The circuit justice held (says Judge Dillon) "that the statute imposing the limitation, the order for the election, the proposition submitted, the order for the issue of the bonds and the latest assessment roll were not, properly, matters *in pais*, but were all public, all open and all accessible, and all of record, and if consulted by the purchaser would have shown the bonds to have been voted and issued in violation of the express limitation upon the power contained in the statute." The judgment was reversed. In referring to it, to the previous case of Town of Coloma v. Eaves, and to the subsequent case of Humboldt Township v. Long, Judge Dillon says, "These cases afford, perhaps, a more striking illustration than any previously decided by that court, that the purchaser may implicitly rely upon the recitals in the bonds made by the proper officers, that the authority to issue them has arisen, and that he is under *no obligation to consult the records of the municipality*, and is *not charged with constructive notice of their contents*; and this, too, it will be observed, where the recital in the bond was *general* and not specific in its nature, and where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township." (Dillon's Law of Municipal Bonds, section 13.) (Italics mine.)

The recital in the bonds in the cases referred to was as follows:

"This bond is issued by virtue of, and in accordance with, an act of the legislature of the said State of Kansas, entitled 'An Act to enable Municipal Townships to Subscribe for Stock in any Railroad, and to provide for the Payment of the Same, approved February 25, 1870,' and in pursuance of and in accordance with the vote of three fifths of the legal voters of the township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870."

It will be observed that this recital is "general." No specific reference to the matter of "excess" is made. This court held that the township was estopped from proving the "excess" or "overissue" by the—general statement—"this bond is issued by virtue of, and in accordance with an act of the legislature, etc., and in pursuance of and in accordance with the vote of three fifths of the legal voters of the township," etc.

The case of Humboldt Township v. Long was decided at the same term. The court held that there was no essential difference between it and the Oswego case. For convenience I quote the language of Mr. Justice Strong:

"There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners when they were inquiring what the value of the taxable property of the township was, but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in *excess* of the statutory limit as shown by the rolls. Whatever may be the right of the township as against those who issued the bonds, it can not be set up against a *bona fide* holder of the bonds, that the amount issued was *too large*, in the face of the decision of the board, and their recital that the bonds were issued *pursuant to and in accordance with the act* of 1870." (92 U. S. 642.) (Italics mine.)

In the leading case of Knox v. Aspinwall, followed by this court in the foregoing cases, the recital in the bonds was in these words:

"This bond is issued in part payment of a subscription of $200,000 by the said Knox County to the capital stock, etc., by order of the board of commissioners *in pursuance* of the third section of the act, etc., approved January 15, 1849."

This court held that this recital was conclusive. "The purchaser (said the court, after quoting the recital) was not bound to look further for evidence of a compliance with the conditions to the grant of the power." (Knox v. Aspinwall, 21 Howard.)

In Moran v. Miami County, 2 Black, 722 and 732, the court said: "We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel *in pais* upon the defendants in this suit." And all the later cases in this court are to the same effect. Now it must be apparent to the court that the indorsement upon the bonds in controversy is quite as specific and comprehensive as the recitals in any of the cases cited, or in any of the numerous cases decided by this court:

> "This bond is issued *as* authorized by an act of the Kentucky Legislature entitled, an act, etc., and by an ordinance of the County Court of Daviess in pursuance thereof.
>
> "GEORGE W. TRIPLETT,
> "*Judge of the County Court of Daviess.*"

If the bonds were issued, "*as* authorized" by the legislative act, and as authorized by the "ordinance of the Daviess County Court in pursuance thereof," they are certainly valid, and the judgment of the circuit court should be affirmed. According to the cases cited, and many cases since decided by this court, the indorsement is conclusive against the county, unless this language is entitled to more weight when it appears by way of *recital* in the body of the bond than when it appears on the back of the bond. It would be difficult, indeed, to give any reason for such a distinction. It is simply an official declaration and is really no part of the bond, whether it appears by way of recital or indorsement. The same effect must be given to it whether it appears in the body of the bond, or across the face of the bond, or across the back of the bond. At last, it is but the official statement, or decision of the county judge, the authorized agent of the county to issue the bonds and to decide when and to what extent he may issue them. In declaring upon the bonds no notice need be taken of these recitals. They are used only as official declarations or certificates of validity in order to give the bonds credit on the market, and to facilitate their sale. And whether these municipal decisions, or official declarations, or official certificates appear in the bond, or across the face of the bond, or across the back of the bond, or in a duly signed *nota bene* to the bond, is wholly immaterial. So the circuit justice decided, and so U. S. Judge Brown decided when he presided temporarily in our circuit. Then, if, as I believe, this indorsement is entitled to the effect given to recitals, it is conclusive by way of estoppel *in pais*, if the decisions of this court are to be followed.

In the case of Hackett v. Ottawa, this court went much further than I ask your Honors to go in this case. The bonds in that case had been executed for *private* purposes, whereas, under the statute, the mayor had no power to execute them except for *public* purposes. Yet the corporation was held bound to pay them, in the hands of a *bona fide* holder, because of the recital that they were issued for *public* purposes. In that case, as in this, the chief officer *had power to issue bonds*, and what was done in abuse of that power was not allowed to invalidate the bonds so issued and in the hands of innocent purchasers for value. "It would (said the court) be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, *having power under some circumstances to issue negotiable securities*, to escape liability upon the ground of the falsity of its own representations (the recital) made through official agents and under its corporate seal as to the purposes for which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case the city, both upon principle and authority, is cut off from any such defense." (99 U. S., 96.) The language of the court, through Mr. Justice Campbell, in the case of Zabriskie v. C., C. & C. Railroad Company, 23 Howard, 381, as to a private corporation, repeated by the court through Mr. Justice Clifford in the case of Bissell v. City of Jeffersonville, as to a municipal corporation, is then reiterated by the court through Mr. Justice Harlan, as peculiarly applicable to this case:

> "A corporation, quite as much as an individual, is held to careful adherence to truth in their dealings with mankind; and can not, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced." (*Ibid.* 96.)

That case decides that although the corporation had no power to issue bonds for private purposes, and although the bonds in controversy were, in fact, issued for private purposes, yet as the corporation had power to issue *bonds*, and as its chief officer did issue bonds, and represented by recital that they were lawfully issued, the corporation was estopped to deny their validity after they had reached the hands of *bona fide* purchasers. So in this case, the county court had the undoubted power to issue bonds, and although in the exercise of that power the county judge may have exceeded his authority by an overissue, yet having represented, over his signature, by indorsement on the back of each bond, that it had been issued as authorized by the law of the State and the ordinance of the county court in pursuance thereof, the county is estopped from contesting the validity of the bonds as to innocent purchasers for value before maturity. And especially is this true since the money for which these bonds were sold has been used in building a railroad entirely across the county, and from which the people of the county have reaped and are still reaping a bountiful return. And this position is greatly strengthened by the fact that when Dickinson purchased these bonds it was known generally, and gave credit and market value to the bonds, that the county had never failed to pay the interest on them, and that the people of the county had unmurmuringly paid taxes from year to year in order to pay the interest, and had in part paid the principal. (Rec. page 29.) These facts should, of themselves, estop the county from making any such defense as is made in this case. And when considered in connection with the indorsement upon the bonds, the defense seems unconscionable and without the support of reason, principle, or authority.

The statute empowered the county court to issue bonds to pay any subscription to the railroad stock the county might make, provided a majority of the voters and tax-payers should vote in favor thereof. The exercise of this power is thus made to depend upon the vote of the people. As between the county court and the people, any bonds issued without the preliminary vote would be void; and as between the same parties it may, for the sake of argument, be conceded that as to any excess of issue over the amount prescribed by the vote the bonds would be void. But this is not true as to *bona fide* purchasers. Let us suppose that *no vote* whatever had been taken as prescribed by the statute. In that case, if the bonds had been issued, containing, by way of recital or indorsement, the representation that they were issued as required or authorized by the statute, according to all the decisions of this court on the subject, such bonds, though void as between the county court and the tax-payers, would be valid in the hands of *bona fide* purchasers. (Grand Chute v. Winegar, 15 Wall. 355; Knox County v. Aspinwall, 21 Howard, 539; Mercer County v. Hackett, 1 Wall. 83; Meyer v. City of Muscatine, 1 Wall. 384.) And why? Manifestly because the purchaser is not bound to examine the records of the county court, and is not charged with constructive notice thereof, but may rely upon the representation, so made by the agent, as conclusive against the principal. Now, if this be true when the *entire* issue is in *excess* of the power granted by the statute, how can it be held that it is not true where only a *part* of the issue is in such excess? If any difference, the estoppel has greater force in the latter than in the former. This court has repeatedly applied it to both.

Nor is this view of the subject at all disturbed by the order of the county court directing the bonds to be issued to the amount of $250,000, in distinct series, and payable at four distinct periods. If these bonds had been issued in *one* series, and all made payable at *one* time, they would have been valid. Such a variance, as this court has often held, would have been a mere irregularity, and would not have invalidated any of the bonds. Moreover, the indorsement not only represents that the bonds were issued as authorized by the statute, but it also states that they were issued as authorized by the ordinance of the county court in pursuance of the statute, thereby making the estoppel complete.

The bonds were all duly signed by the county judge, who might have been compelled by mandamus to subscribe to the stock after the vote had been taken. He was the proper person to make the subscription, and to sign the bonds, and the indorsements thereon. He was the legally authorized agent of the county for these purposes. And if in this case he abused his authority by an overissue of bonds, either his principal or innocent purchasers must suffer. Supposing both to be equally innocent, which must it be? From the time of Lord Holt till now, it has been held that "when an agent is clothed with authority to act, and he exceeds his authority, if one of two innocent parties must suffer from such act, it should fall on the principal who intrusted the agent with such authority." (Hern v. Nichols, 1 Salkeld, 289; Burroughs on Public Securities, 303.) But both are not equally innocent. The people of Daviess County must have known to what extent the county judge had issued the bonds of the county. For years they paid taxes to satisfy the interest upon *all* the bonds which had been issued. They raised by taxation the money to pay bonds in the same category of these bonds. They remained silent for about six years, and never complained until after the bonds had passed into the hands of innocent purchasers. Under such circumstances it is not difficult to determine where the loss should fall, if indeed any loss has been sustained. I will only add that there is nothing in the record to excite even the suspicion that the county judge, in issuing and indorsing the bonds, was guilty of bad faith. He acted in good faith, and as the county has lost nothing it has no right to complain.

Such is the case. I have endeavored to show:

1. That the decision of the Court of Appeals of Kentucky in Daviess County v. Howard, &c., is not a bar to my client's recovery in this case; that the questions in this case are commercial questions which belong to the domain of general jurisprudence, and, besides, that my client can not be prejudiced by that decision, because he was not a party to that proceeding.

2. Conceding that power to execute the bonds must have been delegated by the legislature, that power need not be express, but may be implied from the express power to

create the debt by subscribing for stock. That the extent of this implied power is only to be measured by the necessity which called it into being, and by existing usage in like cases. That the debt, having been created under an express power, must be paid, and that the county court might well pay it as such debts are usually paid, to wit, by issuing and selling negotiable interest-bearing bonds, to the extent that such bonds might be necessary, at their market value, to satisfy the debt. That such being the implied power of the county court, the bonds in controversy are valid. That the express power granted by the act to issue bonds for the "amount" of the subscription, even if necessary, was not intended as a limitation by the legislature, but rather an authority to pay the debt by issuing and selling bonds to an "amount" sufficient for that purpose.

3. That the general power to issue bonds being granted, the indorsement printed on the back of the bonds, and signed by the county judge—the payment of taxes by the people for some six years to extinguish the interest on *all* the bonds, and to pay *some* of the bonds in the category of those now disputed—the silence of the tax-payers for some six years, and until the bonds had passed into the hands of *bona fide* purchasers, and until the railroad, built with the proceeds of the sale, had been completed across their county—constitute such an equitable estoppel as to forever preclude the county from denying the validity of any of the bonds in the hands of *bona fide* holders for value, even if the county court, as contended by plaintiff, exceeded its power by an overissue of bonds.

4. That, as the bonds sold and delivered by the county, before its last sale of the 22d of March, 1870, amounted to only $224,850, the right after that date to issue and sell other bonds to the amount of $25,150 was unquestionable. And as there were at least fifty valid bonds in this last lot of one hundred and eighty-five, and as it is impossible to distinguish the invalid from the valid (all being alike in date, amount,

and form), the county must pay them all, even if it shall be held that there was an overissue.

These positions are all supported by principle and by many decisions of this court. They might have been further elaborated, but this is believed to be unnecessary.

I therefore respectfully ask that the judgment of the circuit court be affirmed.

P. B. MUIR,
For Defendant in Error.

JAMES SPEED,
J. HUBLEY ASHTON,
P. B. MUIR,
Counsel.

AUTHORITIES CITED.

2 Acts of Legis. Ky., p. 83.
Howard v. Daviess County, 13 Bush, 101.
2 Dan. on Neg. Inst., sec 1516.
Olcott v. Supervisors, &c., 16 Wall. 690.
Township of Pine Grove v. Talcott, 19 Wall. 667.
Pana v. Bowles, 107 U. S. 540.
Carroll County v. Smith, 111 U. S. 562.
1 Dan. on Neg. Inst., sec. 812.
Dillon on Mun. Bonds, secs. 7–13.
St. Joseph Township v. Rogers, 16 Wall. 644–659.
Knox County v. Aspinwall, 21 Howard, 539.
Marsh v. Fulton County, 10 Wall. 676.
Bank v. Chillicothe, 7 Ohio.
Hull, &c., v. County of Marshall, 12 Iowa, 142.
Mills v. Gleason, 11 Wis. 470.
State v. Madison, 7 Wis. 688.
Lynde v. County, &c., 16 Wall. 12.
Town of Coloma v. Eaves, 92 U. S. 484.
Humboldt Township v. Long, 92 U. S. 642.
Marcy v. Township of Oswego, 92 U. S. 637.
City of Lexington v. Bullen, 13 Wall. 296.
Moran v. Miama County, 2 Black. 722–732.
Hacket v. Ottawa, 99 U. S. 96.
Grand Chute v. Winegar, 15 Wall. 355.
Mercer v. Hackett, 1 Wall. 83.
Meyer v. City of Muscatine, 1 Wall. 384.
Hern v. Nichols, 1 Salkeld, 289.
Burroughs on Pub. Sec. 303.

117-657

Office Supreme Court U. S.
FILED.
DEC 21 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM 1885.

No. 186.

THE COUNTY OF DAVIESS, Plaintiff in Error,

vs.

J. M. DICKINSON, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

J. HUBLEY ASHTON,
For Defendant in Error.

JAMES SPEED,
P. B. MUIR,
J. HUBLEY ASHTON,
Of Counsel.

Thomas McGill & Co., Law Printers, Washington, D.C.

Supreme Court of the United States.

October Term, 1885.—No. 186.

THE COUNTY OF DAVIESS, PLAINTIFF IN ERROR,

vs.

J. M. DICKINSON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The petition of defendant in error (plaintiff below) counted upon the following bonds and coupons:

(1.) 12 bonds, letter F, at 10 years, for $500 each, Nos. 4, 9, 10, 28, 41, 42, 52, 53, 54, 58, 59 and 60, amounting to $6000.

(2.) 21 bonds, letter F, at 10 years, for $500 each, Nos. 61, 62, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86 and 87, amounting to $10,500.

(3.) 84 coupons, for $15 each, attached to the abovementioned 21 bonds, letter F, due respectively July 1, 1877, January 1, 1878, July 1, 1878, and January 1, 1879, and amounting to $1260.

(4.) 12 coupons, for $15 each, cut from three bonds, letter D, at 15 years, for $500 each, Nos. 151, 152, and 153, said coupons being due respectively July 1, 1877, January 1, 1878, July 1, 1878, and January 1, 1879, and amounting to $180.

(5.) 92 coupons, for $15 each, cut from 23 bonds, letter E, at 20 years, for $500 each, Nos. 151, 152, 153, 157, 161, 163, 166, 167, 171, 175, 176, 202, 211, 214, 217, 218, 219, 227, 229, 238, 239, 244 and 245; said coupons being due respectively July 1, 1877, January 1, 1878, July 1, 1878, and January 1, 1879, and amounting to $1380.

Plaintiff averred that he purchased for value, before maturity, and owned and held these bonds and coupons, which were due and unpaid. (Petition, Rec., pp. 5–7.)

Paragraph I of the original answer, paragraph V of the amended answer, set up a defense to certain of the 21 bonds, *series F*, (10 year bonds,) mentioned in paragraph (2) above, *viz.* No. 68 and Nos. 71 to 88, inclusive; and also to the 92 coupons from the 23 bonds, *series E*, (20 year bonds,) mentioned in paragraph (5) above.

(A) As to the said 21 bonds, of *series F*, (10 year bonds,) it was alleged, that *when those bonds were delivered to the Railroad Company*, it had previously received bonds of the county, *payable in 10 years, amounting to more than* $50,000, the bonds so received being

212 bonds,	series	C,	for	$100 each	$21,200
67	"	F,	"	500 "	33,500
					$54,700

(Rec., p. 6, fol. 15; Ib., p. 16, fol. 41.)

It was not alleged, in the answer, that when the said 21 bonds, of series F, were delivered to the Railroad Company the County Court had issued bonds *in excess of* $250,000.

The facts alleged in the answer as to the sales and deliveries of the bonds, on the contrary, showed, that before these bonds were delivered the County Court had issued bonds to the amount only of $215,450; that they were delivered, on February 17, 1870, as part of a lot of 25 bonds of series F, amounting to $12,500; and that when that lot was thus delivered, the whole amount of bonds issued was *only* $227,950. (Rec., p. 17.)

(B) As to the 92 coupons from the said 23 bonds of *series E*, (20 year bonds,) the answer alleged, that prior to the delivery of those bonds to the Railroad Company, "the said Company had previously received 70 bonds of the said series, *viz.*, Nos. 1 to 70, inclusive, (amounting to $35,000,) and *simultaneously* with the delivery of said first-mentioned bonds, (*i. e.* the plaintiff's bonds,) had received the entire residue of said series, *viz.* bonds Nos. 71 to 255, inclusive, amounting together to $127,500." (Rec., p. 6, fol. 15; Ib., p. 17, fol. 42.)

The answer alleged that the said "entire residue" of the bonds of series E, Nos. 71 to 255, inclusive, (185 bonds,) were delivered on March 22, 1870, and amounted to $92,500; that the bonds delivered before that date amounted in the aggregate to $227,950; and that bonds E, Nos. 71 to 255, were delivered "*simultaneously.*" (Rec., p. 6, fol. 15; Ib., p. 17, fol. 42.)

The answer thus showed that before the 185 bonds of series E, (among which were included the 23 bonds, series E, of the plaintiff,) were delivered to the Railroad Company, on March 22, 1870, bonds to the amount only of $227,950 had been issued by the County Court, and that it required, at least, 44 *of the bonds of series E, delivered March* 22, 1870, *in addition to the bonds of all series, previously issued, to make up the aggregate amount of* $250,000.

Paragraph II of the answer pleaded in bar of the action as to *all* of the bonds and coupons sued on the judgment of the County Court in the suit of *Howard* v. *Daviess County Court, the Owensboro' and Russellville Railroad Company et al.*, declaring, among others, bonds Nos. 61 to 68, inclusive, of series F; bonds, Nos. 151 to 155, inclusive, of series D, and bonds, Nos. 151 to 255, invalid and void. (Rec., pp. 7, 8.)

Paragraph III averred that all the holders of all the bonds were necessary parties to this suit. (Rec., p. 8, fol. 20.)

Paragraph IV averred that to the extent of the difference between the par value of the bonds and the rate at which they were delivered to the Railroad Company, they were usurious and void. (Rec., pp. 10, 11.)

Plaintiff demurred to the 2d and 3d paragraphs of the answer. (Rec., p. 13.)

A replication also was filed to the answer, alleging that in 1870 and in July, 1875, plaintiff purchased the bonds before maturity, in good faith, in open market, from bankers, for value, and without notice of any illegality, if there was any, in their issue.

The replication further set out the facts which, it is alleged, *estopped* the defendant from denying the validity of the bonds in question or any of them. (Rec., pp. 11, 12.)

The court below sustained the demurrer to the 2d and 3d paragraphs of the answer. (Rec., p. 13; Ib., p. 14, fol. 35.)

First Assignment of Error.

The first error assigned is to the admission of evidence, on the part of the defendant in error, to prove that he purchased the bonds and coupons sued on before maturity for value. (Rec., p. 31.)

No argument is made by counsel for plaintiff in error in support of this assignment of error, and it appears to be abandoned. It is clear that the evidence was relevant, and properly admitted.

Second Assignment of Error.

The second error assigned is to the overruling of the motion of plaintiff in error, that the court instruct the jury that upon the pleadings and evidence, the law was for the county, upon the issue joined, and they should find for the county upon the same.

1. No defense was interposed to the 12 ten-year bonds of series F, included in the petition, and it is admitted that defendant in error was entitled to a verdict and judgment for their amount.

The evidence in the case showed that the bonds issued and delivered to the Railroad Company before the 22d of March, 1870, amounted only to $227,950; that on that day, March 22, 1870, the last bonds were sold and delivered to the Company; that they were one lot of 185 twenty-year bonds, of series E, for $500 each, numbered from 71 to 255, inclusive, and amounting to $92,500; that the apparent amount of the issue, over $200,000, after the delivery of these bonds, was thus $70,450; that bonds to the amount of $3100 were returned to the County Court and cancelled; and that the real amount of issue over $250,000, was only $67,350. (Rec., pp. 17, 39; see Argument for Defendant in Error, pages 8, 9.)

($250,000)

It appeared that all the bonds and coupons here in dispute (other than the 92 coupons from the 23 twenty-year bonds, series E, the lowest 151 and the highest 245,) were issued and delivered to the Railroad Company *before* the 22d of March, 1870; and that as all the bonds, delivered before that date, amounted to *less* than $250,000, the bonds in controversy, above mentioned, constituted, when delivered, *no part of the amount of issue over* $250,000. (Rec., pp. 17, 39.)

As to the 92 *coupons from the* 23 *twenty-year bonds, series E, the lowest* 151 *and the highest* 245, it appeared that those bonds were issued as part of the lot of 185 bonds, series E, for $500 each, Nos. 71 to 255 inclusive, amounting to $92,5 0, sold and delivered to the Railroad Company as mentioned, on March 22, 1870; that *all* of the said 185 bonds were delivered at the *same* time to the *same* person;

and that as the entire excess over $250,000, after the delivery of those bonds, was only $67,350, there were, *at least, 50 bonds in the lot, which were within the assumed limit of* $250,000, *and not a part of any excess of issue over that amount.* (Rec., pp. 17, 39; Argument for Defendant in Error, pp. 8, 9.)

It is not proved by plaintiff in error, that the 23 bonds, series E, purchased by defendant in error, constituted, when issued by the County Court, *a part of any excess of issue over* $250,000; and in the absence of such proof the legal presumption, in this case, is, that those bonds were among the 50 bonds, delivered March 22, 1870, which were *within* the assumed limit of $250,000, and *not a part of the issue over and above that amount.*

The County Court had authority, under the law, to issue bonds, and did issue them, and they went into circulation, and came into the hands of a *bona fide* holder; and he is not required, in a suit on them, to prove that the law authorizing their issue was pursued by the constituted authorities; but a failure to pursue that law is a matter of defense, if the bonds of the county are sought to be invalidated on that ground, and the burden of proof is on the county to establish it. (Lincoln *v.* Iron Co., 103 U. S., 416; County of Clay *v.* Society for Savings, 104 U. S., 586.)

2. The first proposition, on the part of defendant in error, is, that as there was authority for the issue of the subscription bonds, which is indorsed on the bonds by reference to the law from which it is derived, the purchaser before maturity was not bound to look further. The County having authority to issue bonds like those purchased by him, he was under no obligation to inquire whether more bonds had been issued than the law authorized. (County of Moultrie *v.* Fairfield, 105 U. S., 374.)

3. Even if it be conceded, contrary to the argument submitted in the principal brief on behalf of defendant in

error, that the County Court had no power to issue any bonds in excess of $250,000, and that defendant in error was bound to go behind the Statute and the endorsement on the bonds to inquire into the orders of the Court in execution of the Statute, it is clear that the provision of the order at July term, 1868, in regard to the amounts of the several *classes*, or *series*, of bonds authorized to be issued, was merely *directory* in its character, and not of the essence of the power under the Statute.

There was *no want of power* to issue more bonds of any class, than the order prescribed for that class; and, at most, the issuing of such bonds was a mere *irregularity*, which cannot avail the County as a defense to the bonds in the hands of a *bona fide* purchaser for value.

It is scarcely necessary to observe that the question as to the rights of a *bona fide* holder of the bonds, relates to the *times when they were sold and delivered to the Railroad Company*, and thus *issued* by the County Court, and not to the times when they were purchased by investors in the money markets of the county; and, in any view of the case, if the assumed limit of $250,000 had not been exceeded, *when the bonds were thus issued*, they are valid obligations of the county in the hands of a *bona fide* holder, although they were issued in excess of the amounts of the respective classes to which they belonged as prescribed by the order of the County Court. The irregularity, if it was one, was committed by the agents of the County; and the County is precluded from taking advantage of it, upon the plainest principles of justice.

4. This would be true if there had been no representation, or warranty, or certificate, on the part of the County Court, upon the bonds, that everything necessary by law had been done, and every fact necessary by law, to have existed, did exist, to make the bonds lawful and binding. But there *is* such a certificate on the back of each bond,

which declared to the purchaser that "*this* bond is issued as authorized by an act of the Kentucky Legislature, approved February 27, 1867, entitled 'An Act to charter the Owensboro and Russellville Railroad Company,' *and by an ordinance of the County Court of Daviess in pursuance thereof.*"

This certificate was *a part of the bond*, as prepared, executed and issued under the order of the County Court, by authority of the Statute.

The order appointed George W. Triplett, presiding Judge of Daviess County Court, William B. Tyler and E. C. Berry, "a committee on behalf of the County Court of Daviess County TO HAVE BONDS EXECUTED AND PREPARED of a sufficient amount to satisfy and pay off the subscription due on the part of the County of Daviess to the Owensboro' and Russellville Railroad; that said bonds shall be of such denominations as said Committee shall deem best, with interest coupons attached; and said bonds shall be signed by the presiding Judge of Daviess County, and the Clerk of the County Court of Daviess County and and have the seal of the County impressed on each." (Rec., p. 22.)

The bonds executed and issued were the bonds which the Committee, as the agents of the County Court, caused to be *prepared* under the order; and the printed certificate endorsed on the bonds, was as much a part of the *bonds*, executed and issued under the order, as anything printed on the face of the bonds.

The certificate was put on the back of the bonds, as prepared, by the Committee, under the authority of the order of the County Court; and in contemplation of law, therefore, it was placed there by the County Court, and it is the *certificate of the Court*, that the bonds were issued as authorized by the Statute and by the ordinance at the July term, 1868.

Certainly this certificate is a representation by the Court that the bonds, as part of the class, or series, to which they belonged, were regularly issued, and disables the County, in a suit on the bonds by a *bona fide* holder, from defending on the ground that they were issued in excess of the amount of such class, or series, as authorized by the County Court.

Such a defense is founded, as we have seen, upon a mere irregularity, if anything, in the execution of a power admitted to have come into being, and not upon a want of power to issue the bonds; and it would seem to be impossible to maintain that it can be permitted in the face of the representation, by the County Court, found endorsed on these bonds.

5. The County is estopped from setting up such a defense by the facts set out in paragraphs X and XI of the "Agreement of Facts," as follows:

> "X. The coupons maturing after issue on all the bonds issued were paid by Daviess County, up to and including coupon No. 16, due January 1, 1877." (The bonds were all issued between June 5, 1869, and March 22, 1870, inclusive. Rec., p. 31.)
>
> "XI. Of the five-year bonds, letter A, the County of Daviess had paid, prior to July 1, 1877, the whole or nearly the whole issue, including among those paid the bonds numbered serially from 501 to 511, both inclusive; and of the five-year bonds, letter B, the County of Daviess, before the 1st of July, 1877, paid the whole or nearly the whole issue, including, among those paid, the bonds numbered serially from 251 to 257, both inclusive. Of the ten-year bonds, letter C, five bonds, numbered 2, 4, 6, 7, and 78, were paid by Daviess County prior to the 1st of January, 1874." (Rec., p. 29.)

These facts of themselves have the effect, under the doctrine held by this Court, in many cases, of curing any such irregularity in the issuing of the bonds in controversy, as is relied on by the County as a defense to this suit. (Supervisor *v.* Schenck, 5 Wall., 772; Pendleton County *v.* Amy, 13 Wall., 297; County of Clay *v.* Society for Savings, 104 U. S., 591; Anderson County Commissioners *v.* Beal, 113 U. S., 240.)

Third and Fourth Assignments of Error.

The third and fourth assignments of error relate respectively to the two instructions given to the jury, to the effect that the law was for the defendant in error if he bought the bonds and coupons sued on before maturity and for value, without notice, (*i. e.*, *actual* notice,) that more than $250,000 of bonds had been issued by the county, and that he was not bound, before purchasing the bonds, to examine the records of the Daviess County Court, and cannot be presumed to have known, when he made the purchase, what those records contained.

1. The view of the law intended to be expressed by these instructions, is discussed so fully in the principal Brief for Defendant in Error, that it is necessary only to refer here to that argument. That view was, that defendant in error, when he made his purchase of bonds, should be held to have known nothing except the provisions of the Statute authorizing their issue, and that the endorsement on the bonds protects him as completely as if the same language had appeared, by way of recital, in the body of the bonds, and that the County is thereby estopped from pleading or proving an "over-issue," if defendant in error had no *actual* notice, at the times he made his purchases, that more than $250,000 of bonds had been issued by the Court.

2. Even if the party purchasing such bonds had actual notice, or could be affected with notice, of the orders of the County Court, it would seem impossible to hold, as we respectfully submit, that it was incumbent on him to examine the reports, or returns, of the agents of the Court, for the purpose of ascertaining whether or not those agents

had issued bonds in excess of the amount authorized by law, or in excess of the amounts of their respective classes as authorized by those orders.

The Legislature contemplated that the bonds would be sold in the money markets of the world, and it is not to be believed that they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to have an *account stated* of the sales of the bonds, and inquire as to each one, whether or not it was issued in excess of the statutory or other limit.

The reports of the agents for the delivery of the bonds were, properly speaking, matters *in pais*, which a purchaser was not charged with the duty of inquiring into; and although they were in fact among the records of the County Court, they constituted no part of the "*record*" of the Court which a purchaser of the bonds in the market was obliged to take notice of, in any view of the case.

The purchaser was not bound to inquire as to the regularity of the conduct of the agents of the Court charged with the duty of issuing the bonds. He had a right to presume that they were competent and honest, and properly performed the duty with which they were charged; and he could not be called upon to ascertain how many obligations may have been put upon the market, so long as there was statutory authority for the issue of such bonds as he was purchasing. He was not charged with notice that a fraudulent or improper execution of the law was to be anticipated. On the contrary he might rightfully presume from the fact of the bonds being in circulation, that they were within the prescribed limit, and issued in good faith and in a regular manner. (Lewis *v.* Commissioners, 105 U. S., 749; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y., 125.)

3. If there should be found (contrary to our contention and belief) any error in the instructions, it is plain that no

harm was done to the plaintiff in error, as upon the facts in evidence before the jury, and set out in the answer, as we have seen, the defendant in error was entitled to recover the amount of all the bonds and coupons sued on, independently of the propositions contained in the instructions.

The answer of plaintiff in error, and the evidence before the jury, showed that there was no issue of bonds over $250,000 at the times the bonds purchased by him were sold and delivered, and issued, by the County Court to the Railroad Company; and his bonds, as we have seen, were, or are deemed to have been, when issued by the Court, *within the assumed limit of* $250,000.

The defense set up in the answer, that the bonds were issued in excess of the amounts of the classes to which they respectively belonged, as authorized by the order of the County Court, is no legal defense whatever, as we have shown, to this suit.

The validity of the bonds is to be tested and determined, as we have said, by the facts as they existed at the times the bonds were sold and delivered to the Railroad Company; and, upon any theory of the case, as there was *then* no issue of bonds in excess of $250,000, the bonds here in dispute are valid obligations of the County in the hands of the defendant in error, as a *bona fide* purchaser for value, without notice of any irregularity in their issue.

Fifth Assignment of Error.

The fifth error assigned is to the order of the Court below sustaining the demurrer of defendant in error to the 2d and 3d paragraphs of the answer.

1. The second paragraph of the answer, as we have seen, pleaded the judgment of the Daviess Circuit Court,

in the *Howard* case, in bar of the action on all of the bonds here in controversy. (Rec., p. 8, fol. 19.)

No argument appears to be made on behalf of plaintiff in error in support of this plea of *res adjudicata;* and it is plainly bad in substance upon principles settled by a multitude of decisions of this Court. (Brooklyn *v.* Insurance Co., 99 U. S., 370; St. Clair *v.* Cox, 106 U. S., 353; Pana *v.* Bowler, 107 U. S., 545; Scotland County *v.* Hill, 112 U. S., 183; County of Warren *v.* Marcy, 97 U. S., 105.)

It is not pretended that the defendant in error was a party by name to the suit of the taxpayers against the County Court and others, or that he was served with process in that suit, or appeared therein; and it is not alleged that he bought any of the bonds sued on with actual notice of the pendency of the suit. He cannot, therefore, be affected by the decree made therein by the State Court.

To apply the language used by Mr. Justice Wood, speaking for this Court, in another case:

> "It would be a reproach to jurisprudence if the rights of a citizen of Tennessee to recover the contents of a chose in action, held and owned by him, could be cut off by a suit in Kentucky to which he was not made a party by name, and in which there was no personal service or appearance." (Pana *v.* Bowler, 107 U. S., 545.)

2. The fifth assignment of error, so far as it relates to the action of the Court below, in sustaining the demurrer to the third paragraph of the answer, appears to be abandoned, as no argument is made in its support in the Brief for Plaintiff in Error.

Sixth and Seventh Assignments of Error.

These relate to no matters assignable as error in this Court.

The verdict and judgment for the amount of all the bonds and coupons sued on here were right, and no other verdict and judgment would have been right, upon the pleadings and evidence in this record.

It is respectfully submitted, therefore, that the judgment should be affirmed, with costs.

J. HUBLEY ASHTON,
For Defendant in Error.

JAMES SPEED,
P. B. MUIR,
J. HUBLEY ASHTON,
Of Counsel.

Office Supreme Court U.S.
FILED.
MAR 10 1886
JAMES H. McKENNEY,
CLERK.

117-657

Supreme Court of the United States

OCTOBER TERM, 1885—No. 186.

THE COUNTY OF DAVIESS, - Plaintiff in Error, Versus **J. M. DICKINSON, - - - - Defendant in Error.**	**Supplemental Brief for Defendant in Error.**

In Error to the Circuit Court of the United States for the District of Kentucky.

JAMES SPEED, for Defendant in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1885—NO. 186.

THE COUNTY OF DAVIESS, - - *Plaintiff in Error,*

VERSUS

J. M. DICKINSON, - - - *Defendant in Error.*

Supplemental Brief for Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kentucky.

This supplemental brief is presented only to place before the court, in a convenient form, a recent and unreported opinion of the Court of Appeals of Kentucky, and certain sections of statutes of the State, which it is believed will aid the court in its investigation of some of the questions involved in this case.

The opinion is copied in full, but only such portions of it need be considered as determine what is intended or embraced by the term "county court," and what acts of the county court worked an "*estoppel*" upon the county:

“COURT OF APPEALS OF KENTUCKY.

November 20, 1884.

E. R. Cook, - - - - - *Appellant,*
VERSUS
Lyon County, - - - - *Appellee.*

Same, - - - - *Appellant,*
VERSUS
Same, - - - - *Appellee.*

C. A. Thompson, - - - *Appellant,*
VERSUS
Lyon County, - - - *Appellee.*

Appeals from Lyon Circuit Court.

“The court, having been sufficiently advised, delivered the following opinion herein:

“The appellee, by a cross-appeal in these cases, questions the right of the appellants to a judgment upon the overdue interest coupons held by them and which were attached to its bonds that were issued and delivered to the Elizabethtown & Paducah Railroad Company by virtue of an act to amend the charter of said road, approved February 24, 1868. It is proper that they should be first considered, because, if sustained, the appeals by the appellants must fail.

“It is urged that the bonds and coupons are not valid, because the county judge, in ordering the election to take the vote as to whether the county should subscribe stock to said road and in making the subscription and issuing the bonds therefor, acted *alone* and without associating the justices of the county with him. The act in question provides that ‘all this *shall* be done by the county court,’ and contains no language from which it can be even inferred that the legislature intended that it should be done by the county levy or fiscal court of the county; and, although there is some reason in the claim that when the term 'county court' is used as to fiscal matters, it refers to the fiscal court, yet, *as a general rule, when reference is made to a county court it means a court presided over by the county judge alone*, and should be held to so mean when used in connection with fiscal matters if it relates to mere ministerial duties. Moreover, in this instance the direction of the legislature to the county court to do these ministerial acts was imperative, and it is, therefore, immaterial whether it was done by the county judge alone or by him and the justices, even admitting (as we do not), that a *bona fide* holder of the bonds can be affected by such matters.

"The non-delivery of the certificates of stock to the county, or that the payment of the coupons was never demanded at the bank where they were payable, can not avail the appellee, as no refusal by, or inability of the company to deliver the certificates is alleged, or that the appellee had provided the funds at the stipulated place of payment to satisfy the coupons. In fact, it is alleged and not denied, that it had not done so, and certainly an innocent holder of them was not bound to look to the delivery to the county of the stock certificates.

"Finally, it is urged that the above-cited act is unconstitutional, because it required the county court to submit to a vote any sum, however large, that the railroad company might name as a proposed subscription to its road. We deem it a sufficient answer to this to say that the voters of the county had a right to reject it as they pleased, and that its submission did not require its acceptance. The appellee has *estopped* itself from relying upon some of the defenses above noticed by its action. It had, *before these suits were brought, levied and collected a tax to pay the interest coupons* attached to the bonds; it had obtained from the legislature, in 1878, an act to authorize it to levy and collect a tax to enable it to purchase these very bonds before their maturity from the holders, and had, in fact, by virtue of the act, levied and collected a tax for such purpose. *It can not, therefore, be heard now to say that the bonds and coupons are invalid.*

"This conclusion as to the grounds of the cross-appeal necessitates the consideration of the appeals proper, and, to do so properly a brief statement of facts is necessary.

"By section 9 of the act above named, and, under which the coupons were issued, it was made the duty of the county court of Lyon County to levy, and cause to be collected, a tax sufficient to pay the interest on the bonds, and which was due semi-annually.

"Section 10 provided for the appointment by the county court of a 'Board of Commissioners of the Sinking Fund' of the county, one of whom was to be its treasurer, and receive the fund that might thus be collected for the payment of the coupons; and, when collected, it was to be appropriated to their payment.

"The act made provision, also, for the payment of the bonds or the principal of the debt, and provided that any dividends which might be declared upon the county's stock in the railroad were to be applied first to the payment of the interest upon the debt, and then any surplus remaining was to be used in purchasing the bonds.

"By an act of the legislature, entitled, 'An act for the benefit of the tax-payers of Lyon County,' approved February 6th, 1878, a financial board of Lyon County was created; and section 11 provides as follows:

> "'It shall be the duty of said financial board to decide whether a levy should be made by the county court of Lyon County for the purpose of raising a sinking fund, *to be used in the purchase* of the bonds of Lyon County given to the Elizabethtown & Paducah Railroad Company before the maturity of said bonds; and similar levies shall be made as often as said board may decide.'

"Section 17 of the act provided for the appointment by the county court of a treasurer to receive said fund, while section 20 reads thus:

" 'The money realized from taxes levied and collected under this act *shall be used alone for the purchase of the principal* of the said bonds given by Lyon County to the Elizabethtown & Paducah Railroad Company, and the cost and expenses incident to the levies and collection thereof; and *shall not be appropriated to or used for any other purpose by any character or order of proceedings whatever.* After a levy shall have been made, pursuant to this act, it shall be the duty of said county court to negotiate with the holders of said bonds in regard to the purchase thereof, and shall have the authority to agree with them upon the price they shall receive for their said bonds, and to prescribe rules to govern said treasurer in the purchase thereof, subject to such restrictions as to the amount that may be paid for them as may be fixed by said financial board.'

"The appellants, having attached the fund raised under this last act, the court below held that it could not be seized by legal process to pay their debts evidenced by the interest coupons, and of this ruling they now complain.

"It is admitted by their eminent counsel that if the restriction imposed upon the use of this fund by the legislature is valid and constitutional, that they can not succeed; but it is urged that it is illegal, and the act to that extent only is unconstitutional.

"It seems to us that if the money is not appropriated to the use for which it was especially raised by taxation, that then it would be held in trust by the party in possession of it for the tax-payers, and that it would have been refunded to them, and could not be subjected by the appellants; and, even if it did not have to be returned to them, but fell into the general treasury of the county, then it may well be doubted whether it could be reached by the appellants by attachment.

"The authorities are conflicting upon this question.

"It seems reasonable to suppose that if a county can contract a debt, that its property should be liable to seizure to pay it; but the offices of government must be performed and not impeded, and the need of this is so absolute that other considerations can not prevail; and the current of authority is that means or property which are used for strictly governmental purposes can not be seized by attachment or upon execution. (1 Dillon on Mun. Cor., Secs. 100-101.)

"It is true, however, that, as to all this transaction, the county is to be treated as a *quasi* private corporation.

"It was not acting as to a governmental use or trust. Says Mr. Dillon in section 576 of the work, *supra*:

> "'In some of the States it is held that the private property of municipal corporations, that is, such as they own for *profit*, and charged with no public trusts or uses, *may be sold on execution* against them. In other States, either by statute or on general principles, it is declared that judgments against municipal corporations can not be enforced by ordinary writs of execution, and that the remedy of the creditors is by *mandamus* to compel payment, or the levy of a tax for that purpose.
>
> "'Questions of this kind are influenced much by local legislation. On principle, in the absence of suitable provision, it would seem to be a sound view to hold that the right to contract and the power to be sued gives the creditor a right to recover judgments; that judgments should be enforcible by execution against the strictly private property of the corporation; but not against property owned or used by the corporation for public purposes. (Merriwether v. Garrett, 102 U. S. S. Court Rep. 501.)'

"We therefore conclude that the fund in question is liable to the attachments of the appellants, if the legislative restriction as to its use is not valid. It is not to be presumed that the law-making power has acted in violation of the Constitution. It is true that a legislature can not dispense with or suspend the operation of a general law in favor of a particular individual. For instance, the law of exemption can not be varied for particular individuals or localities.

"The Statute of Limitations can not be suspended for a particular individual. The privilege of taking a greater rate of interest than is allowed by the general law can not be given to a particular person; but the case now presented is not, in our opinion, of such a character.

"The act which authorized the issue of the appellants' coupons provided the manner and means of payment. They must be presumed to have accepted them, looking to the mode thus provided for their payment; they can compel it by the proper legal procedure, and had no claim upon the legislature for any additional remedy. The fund in contest was created by the legislature for and limited to a special purpose.

"An examination of the legislative proceedings will show that this has been done in cases substantially similar to this from time immemorial.

"The limitation violated no vested right of a creditor. The creation of the fund was purely a voluntary matter upon the part of the legislature, which the creditors had no right to demand; and hence, it had the power to limit the use of it.

"The writer last cited says:

> "'The legitimate authority of the legislature over municipal corporations extends to making provisions concerning their *funds and revenues*, and the authority is not abridged because the purpose to which the revenue is to be appropriated is specified in the charter.' (Dillon on Mun. Corp., Sec. 62.)

"In this instance the county could not have ordered the treasurer of the financial board to apply the money to a different purpose from that provided by the legislature, and the appellants have no greater right than the county authorities had as to it.

"It is said, in Sec. 458 of Drake on Attachments, that 'a fundamental doctrine of garnishment is that the plaintiff does not acquire any greater rights against the garnishee (who was the treasurer in this case) than the defendant himself possesses.'

"The judgment below is affirmed upon both the original and the cross-appeals.

"A copy. Attest: THOMAS J. HENRY, *C. C. A.*
"By ROBERT L. GREENE, *D. C.*"

That the court may see that the term "county court" is used by the legislature in the act referred to in the foregoing opinion precisely as it is used in the act authorizing the issue of the bonds in controversy, I here copy the second, seventh, and ninth sections of said act:

SEC. 2. That whenever the said Elizabethtown & Paducah Railroad Company shall request the *county court* of any county, through or adjacent to which it is proposed to construct said road, to subscribe, either absolutely or upon specified conditions, a specified amount to the capital stock of said company, the *county court* so requested shall forthwith order an election to be held at the several voting places in said county, on a day to be fixed by the court, not later than thirty (30) days after the making of such order, and shall appoint judges and other officers necessary to hold said election.

SEC. 7. That if any county, city, or town shall subscribe to the capital stock of said Elizabethtown & Paducah Railroad Company, under the provisions of this act, it shall be the duty of the *county court* of such county, the mayor and council of such city, and the board of trustees of such town, to *issue the bonds* of such county, city, or town, in denominations of not less than one hundred nor more than one thousand dollars, in payment thereof, with coupons attached, under the seal of such county, city, or town; the bonds of the counties to be signed by the county judge, and countersigned by the clerk, and the coupons to be signed by the clerk alone. The bonds of cities subscribing shall be signed by the mayor, and countersigned by the city clerk or auditor, and the coupons shall be signed by the clerk or auditor alone. The bonds of towns subscribing shall be signed by the president of the board of trustees, and countersigned by the town clerk, and the coupons shall be signed by the clerk alone. Such bonds shall be negotiable and payable to bearer in the city of New York, at not more than thirty (30) years from their date, and shall bear interest at a rate not greater than eight (8) per cent, payable semi-annually in the city of New York.

SEC. 9. That in case any county, city, town, or election district shall subscribe to the capital stock of said Elizabethtown & Paducah Railroad Company, under the provisions of this act, and *issue bonds* for the payment of such subscription, it shall be the duty of the *county court* of such county, the city council of such city, and the trustees of such town, to cause to be levied and collected a tax sufficient to pay the semi-annual interest on the bonds issued and the cost of collecting such tax, and paying the interest on all the real estate

> and personal property in said county, city, or town, subject to taxation under the revenue laws of the State, including the amounts owned by residents of such county, city, town, or election districts, which ought to be given in under the equalization laws. (Acts Ky. Legis., vol. 1, pages 622-3-4.)

By reference to the first and second pages of the principal brief for defendant, the court will perceive that in the statute under which the bonds in controversy were issued, the term "county court" was used in the same sense in which it was used in the foregoing act. The "county court" named in each of these acts is the court held by the county judge alone. It was therefore the duty of the county judge to sign the bonds, and he had full power to make the indorsement upon them.

It is proper to say that the legislature of Kentucky, as to all such charters, enacted *since* the 1st day of December, 1873, has changed the rule, by expressly providing that, in all such cases, the justices of the county shall preside with the county judge.

The act reads as follows, to wit:

> SEC. 2. If, under the provisions of any law *hereafter enacted*, it is required of the county court to submit to the qualified voters of the county, or to the qualified voters of any local community therein, the proposition to take stock in any company or to levy any tax other than for common school purposes; or if, under any law hereafter enacted, it is required that the county court shall decide upon the issual of any bonds of the county, or of any district or local community therein, to any railroad or other company, it shall be the duty of the county judge to cause all the justices of the peace of such county to be summoned to attend at the term of the court at which any such action is proposed to be taken, who shall be associated with the county judge, and constitute the county court for the occasion. A majority of all the justices of the peace of the county shall constitute a quorum for the transaction of business; *Provided*, That the provisions of this section shall not apply to any incorporated city or town which votes on such questions separately from the county in which it is located. (Gen. Stat., chap. 28, art. 17, sec. 2, page 306.)

The General Statutes of Kentucky went into effect on the 1st day of December, 1873. (Gen. Stat., art. 1, sec. 1.) The charter of the Owensboro & Russellville Railroad Company was approved February 27, 1868. So, that the above provision has no application whatever in this case, as by its terms it is confined to "any law *hereafter* enacted." The legislative interpretation of the term "county court" was, in 1873, the same as that given by the Court of Appeals in the foregoing opinion. It was that interpretation which suggested the change made by the statute last cited.

Respectfully, JAMES SPEED,
For Defendant in Error.